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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA, *et al.*,
Petitioners,

v.

AUSTIN PRODUCTS CO., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Is a plaintiff seeking damages in an antitrust action, and resisting a properly supported summary judgment motion, obliged under *Anderson*, *Matsushita* and *Monsanto*[*] to come forward with evidence that supports his assertions regarding defendants' motives or intent, or are those allegations exempt from Fed. R. Civ. P. 56's requirement to "set forth specific facts showing that there is a genuine issue for trial"?

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[*] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

THE PARTIES

Petitioners are (1) the Workers' Compensation Insurers Rating Association of Minnesota ("WCIRAM"), which from 1921 to 1984 was an unincorporated association, created by State statute, to which each company selling workers' compensation insurance in Minnesota was by State law both required and entitled to belong; and (2) the following insurance companies, each of whom (among others) sold workers' compensation insurance in Minnesota during the years 1979-1983: Aetna Casualty & Surety Co., Continental Insurance Co., Federated Mutual Insurance Co., Fireman's Fund Insurance Co., The Home Insurance Co., Liberty Mutual Insurance Co., Michigan Mutual Insurance Co., Sentry Insurance, a Mutual Company, St. Paul Fire & Marine Insurance Co., Transport Insurance Co., The Travelers Insurance Co., and Twin City Fire Insurance Co.

Respondents are A&M Moving & Storage Co., Austin Products Co., Briggs Transportation Co., Butterfield Foods Co., Tony Downs Foods Co. and the Diocese of Winona. Each respondent commenced an action against petitioners alleging that respondent purchased workers' compensation insurance in Minnesota during the years 1979-1983, and purports to sue on behalf of a class of all others similarly situated. The six separate actions have been consolidated for all purposes. As of the date of this petition, no class has been certified by the district court.

Petitioners respectfully refer the Court to pages A92-A97 of the Appendix hereto for a listing, pursuant to Rule 28.1, of petitioners' parents, subsidiaries (except wholly owned subsidiaries) and affiliates.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 10, 1989.

OPINIONS BELOW

The opinion of the court of appeals is reported at 867 F.2d 1552 (8th Cir. 1989). The opinion of the district court granting in part and denying in part defendants' motion to dismiss is reported at 574 F. Supp. 525 (D. Minn. 1983). The opinion of the district court, dated July 28, 1987, granting defendants' motion for summary judgment is not reported. All three opinions, together with the judgment of the court of appeals and other materials, are reprinted in the Appendix hereto and are cited to herein as A___.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1989. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The McCarran-Ferguson Act ("McCarran Act") § 2(b), 15 U.S.C. § 1012(b), provides in pertinent part as follows:

> "[T]he Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

McCarran Act § 3(b), 15 U.S.C. § 1013(b), provides as follows:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The provisions of Sherman Act § 1, 15 U.S.C. § 1, Fed. R. Civ. P. 56, and certain Minnesota statutes relevant to the underlying facts of this case, are set out at A86-91.

STATEMENT OF THE CASE

This petition presents, in the context of a dispute as to the applicability of the so-called "boycott exception" of the McCarran Act, 15 U.S.C. § 1013(b), the question whether a district court must deny a motion for summary judgment if the nonmovant offers only ambiguous evidence of an agreement and offers only unsupported inferences as to the movants' "motive and intent," as the Eighth Circuit held here (citing

as "particularly appropriate" *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962)), or whether a nonmovant's obligation to come forward with evidence that tends to exclude the possibility of lawful conduct applies to assertions regarding defendants' motive or intent—as this Court stated in *Matsushita* and *Anderson* and as several circuits have since held.[1]

This case concerns the business of workers' compensation insurance in Minnesota, which (as in most states) has long been stringently regulated under State law. Prior to 1979, Minnesota insurers were required to charge premiums based upon State-approved rates. Beginning on June 12, 1979, insurers were permitted to use the State-approved rates or lower rates, as long as the lower rates were not discriminatory. Respondents (plaintiffs below) claimed that workers' compensation insurers, including the insurer petitioners (defendants below), engaged in unlawful price fixing by entering into an agreement not to use lower rates. The courts below consistently have held that McCarran Act § 2(b) bars plaintiffs' claims for "mere price fixing." 867 F.2d at 1561 (A21); 574 F.2d at 535 (A58; *see also* A75). Plaintiffs assert that they are nevertheless entitled to pursue a Sherman Act § 1 claim because the insurers engaged in "enforcement activity" in support of their alleged price-fixing agreement,

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1. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See, e.g.*, the following antitrust cases: *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 294 (5th Cir. 1988); *Houser v. Fox Theatres Mgt. Corp.*, 845 F.2d 1225, 1231 & n.13 (3d Cir. 1988); *Key Financial Planning Corp. v. ITT Life Ins. Co.*, 828 F.2d 635, 640 (10th Cir. 1987); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 659-60 n.4 (7th Cir.), *cert. denied*, 108 S. Ct. 488 (1987); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102-103 (4th Cir. 1987); *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987); *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568, 572 (6th Cir. 1986). *See also, e.g., Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 756 (2d Cir. 1986) (securities fraud); *Gomez v. Chody*, 867 F.2d 395, 402 (7th Cir. 1989) (housing discrimination); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989) (civil rights).

enforcement activity assertedly within the "boycott exception" of McCarran Act § 3(b). The district court, applying *Matsushita*, *Anderson* and *Celotex*, granted summary judgment. The court of appeals, ignoring those decisions, reversed.

The Minnesota Regulatory Scheme. For 58 years prior to 1979, Minnesota workers' compensation insurers were required to set premiums based on rates promulgated by the statutorily created rating bureau–the Workers' Compensation Insurers Rating Association of Minnesota ("WCIRAM")–and approved by the Commissioner of Insurance or his predecessors. 1921 Minn. Laws Ch. 85 § 21, *codified at* Minn. Stat. § 79.21. From June 1979 until December 1983, Minnesota law provided that "no insurer shall write insurance at a rate that *exceeds* that made and put into force by the bureau and approved as reasonable by the commissioner." However, rates lower than those approved by the commissioner were permitted only if such rates were not "unfairly discriminatory."[2]

On or about June 15, 1979, within one week after the amended law became effective, WCIRAM sent a circular letter to each of its members (every workers' compensation insurer in Minnesota) describing the 1979 amendments to Minnesota law. The letter explicitly stated that "Section 11 permits an insurer to offer premiums lower than the approved rates."[3]

In 1981, the Minnesota Legislature repealed § 79.21, and many other provisions of its workers' compensation insurance law, effective July 1, 1983. 1981 Minn. Laws Ch. 346 § 145. The effective date of the repeal was later adjourned to January 1, 1984. 1983 Minn. Laws Ch. 290 § 15. Since

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2. 1979 Minn. Laws Extra Sess. Ch. 3 § 11, *codified at* Minn. Stat. § 79.21 (1982) (A90-91); *see* 867 F.2d at 1555 (A8). The principal Minnesota laws cited herein are reproduced at A88-91.

3. Supplemental Affidavit of John P. Hildebrandt ¶ 12, submitted in support of defendants' motion for summary judgment, June 22, 1984.

January 1, 1984, rates for workers' compensation insurance in Minnesota have been limited only by the requirement that they "not be excessive, inadequate, or unfairly discriminatory." Minn. Stat. § 79.55(1) (1986).

Throughout the period from 1921 through 1983, Minnesota law directed that "every insurer transacting the business of workers' compensation insurance in this state shall be a member" of WCIRAM, Minn. Stat. § 79.11 (1982) (A89), and that WCIRAM "shall admit to membership any insurer authorized to transact workers' compensation insurance in this state." Minn. Stat. § 79.12 (1982) (A90).[4] The power to authorize an insurer to transact workers' compensation insurance was vested in the Commissioner of Insurance, not in WCIRAM. Minn. Stat. § 79.01(2) (1982) (A88-89).

The Proceedings Below. Plaintiffs allege that they were purchasers of workers' compensation insurance in Minnesota between June 12, 1979, and the dates their complaints were filed in 1983, and seek to represent a class of all such purchasers. In their original complaints, plaintiffs set forth a single federal antitrust count, alleging that defendants had engaged in unlawful price fixing by agreeing among themselves that they would employ the rates promulgated by WCIRAM and approved by Minnesota's Commissioner of Insurance as the maximum rates. Thus, plaintiffs challenge the practices of WCIRAM and its member insurers during the period of partial rate deregulation in the years 1979 through 1983. During that period insurers were required to charge the maximum allowed rate *or less*, and if they charged less to

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4. WCIRAM's statutory powers and duties included developing a system of classification for workers' compensation insurance. *See* note 11 *infra*. Each insurer was required to file with WCIRAM a copy of each audit of an insured's payroll, and WCIRAM was required to review those audits to confirm that the correct rates had been applied. Minn. Stat. § 79.17 (1982) (A90). WCIRAM was also directed to adopt "articles of association and bylaws for its government and the government of its members," which "shall be filed with and approved by the [insurance] commissioner and shall not be effective until so filed and approved." Minn. Stat. § 79.12 (1982) (A90).

do so in a nondiscriminatory manner. Minn. Stat. § 79.21 (1982) (A90-91). During that period, insurers were still required to be members of WCIRAM, and WCIRAM was still required to admit to membership all insurers authorized by the Commissioner of Insurance to write insurance in Minnesota. Minn. Stat. §§ 79.11, 79.12 (1982) (A89-90). As had been the case since 1921, WCIRAM was still required to "adopt articles of association and bylaws for its government and for the government of its members," and those articles and bylaws still had to be filed with the insurance commissioner. Minn. Stat. § 79.12 (1982) (A90).

Shortly after the complaints were filed, defendants moved to dismiss. The district court (Magnuson, J.) ruled in November 1983 that the antitrust exemption provided in McCarran Act § 2(b) applied to the conduct alleged, finding that such conduct constituted the "business of insurance" and was "regulated by state law" within the meaning of the Act. 574 F. Supp. at 529-33 (A46-54). On this basis, the district court held that plaintiffs could not pursue a claim for price fixing. 574 F. Supp. at 535 (A59). However, the district court declined to dismiss the actions altogether because the complaints included a single conclusory allegation that defendants had "agreed to police adherence to uniform price-related terms"—an allegation which the court thought might amount to "enforcement activity" sufficient to trigger the "boycott exception" of McCarran Act § 3(b). 574 F. Supp. at 535 (A58).[5] The district court so concluded notwithstanding the fact that plaintiffs set forth only *one* federal cause of action—for price fixing—and did not allege

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5. The district court held, following this Court's decision in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, (1978), that "mere price fixing" would not suffice to satisfy § 3(b). 574 F. Supp. at 535 (A57-58). However, the court concluded that "there appears to be an undesignated point, on the line between 'mere price fixing' and an absolute refusal to deal, where enforcement activity in support of a conspiracy to fix prices gives rise to a 'boycott' for purposes of the McCarran Act exemption." *Id.*

a refusal to deal of any kind whatsoever.[6] The district court nonetheless anticipated that plaintiffs' complaints might well not survive a motion for summary judgment, and expressly invited defendants to make such a motion following discovery. 574 F. Supp. at 535 (A59).

Following extensive discovery on the "boycott issue," defendants moved for summary judgment. In responding, plaintiffs relied on the WCIRAM bylaws and WCIRAM's performance of its statutory duties to assert that WCIRAM could and would enforce an assumed price-fixing agreement by threatening to expel any insurer that did not comply—an assertion made in the face of the Minnesota statute requiring WCIRAM to admit to membership any insurer authorized by the Commissioner of Insurance to write workers' compensation insurance. Minn. Stat. § 79.12 (1982) (A90). Plaintiffs did not assert that any insurer or WCIRAM had attempted to enforce the alleged price-fixing conspiracy by refusing to deal with any other insurer.

The district court (Rosenbaum, J.) granted defendants' motion for summary judgment on plaintiffs' federal claims and, citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), dismissed plaintiffs' claim under State antitrust law.[7] Applying the standards for summary judgment articulated by this Court, and citing *Anderson*, *Matsushita* and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1988) (A70), the district court concluded that there was "no evidence" that the alleged price-

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6. On defendants' motion for rehearing, the district court certified its decision for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (A60-63) The court of appeals denied the petition to appeal.

7. By the time defendants' summary judgment motion was heard, plaintiffs had served a four-count consolidated amended complaint. Count I repeated the price-fixing claim that Judge Magnuson had held was barred by the McCarran Act. Count II alleged that defendants had engaged in "horizontal" enforcement activity against any insurance company that did not adhere to the price-fixing arrangement. Count III alleged that defendants had engaged in a "vertical" boycott by refusing to deal with plaintiffs on any terms other than the price-fixed terms. Count IV alleged violations of Minnesota antitrust law.

fixing agreement[8] was ever enforced (A77); that any insurer was ever expelled or threatened with expulsion from WCIRAM for failing to charge premiums based on maximum rates (A77, A79); that any insurer understood that it might be expelled from WCIRAM if it charged lower-than-maximum prices (A73); that any insurer believed, on the basis of WCIRAM communications, that it was required to charge maximum rates (A75); or that any insurer changed its rates in response to any WCIRAM criticism or suffered any adverse consequences from failing to charge the maximum rate (A75). The district court concluded:

> "No insurer was expelled from WCIRAM, prevented from selling workers' compensation insurance in Minnesota, nor forced to change its rates. In short, no insurer was prevented from competing in the workers' compensation business."

(A82)

In reversing the district court, the Eighth Circuit ignored this Court's 1986 decisions in *Matsushita*, *Anderson* and *Celotex*, allowed plaintiffs the benefit of unsupported inferences and, relying on *Poller*, held that there was a genuine issue of fact as to whether defendants had entered into an "agreement to boycott."[9] The court of appeals did not dispute the district court's conclusion that there is "no evidence" that anyone—customer or competitor—was in fact boycotted, coerced or intimidated. 867 F.2d at 1561-63 (A21-

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8. For purposes of their motion to dismiss and subsequent motion for summary judgment, defendants conceded what they vigorously deny for all other purposes: that they engaged in price fixing. *See* 867 F.2d at 1562 (A23).

9. The panel majority (Lay, Chief Judge, and Brown, Senior Circuit Judge) agreed with Judge Magnuson's earlier ruling (adhered to by Judge Rosenbaum, A69) that the alleged conduct constituted the "business of insurance" and was "regulated by state law," thus satisfying McCarran Act § 2(b). 867 F.2d at 1555-60 (A9-18). Judge Beam, in a concurring opinion, stated that he would reverse the district court on the § 2(b) issue and therefore did not reach the § 3(b) issue. 867 F.2d at 1568-70 (A35-39).

23). Rather, the court of appeals reasoned that § 3(b) applies to *agreements* to boycott, coerce or intimidate, as well as acts of boycott, coercion or intimidation, *id.* at 1562, 1567 (A22, A33), and that there was "more than sufficient evidence *and the available inferences therefrom* to create a question of fact concerning the defendants' motive and intent to boycott, coerce or intimidate insurers in adhering to a fixed rate under threat of expulsion from membership in WCIRAM." *Id.* at 1567 (emphasis added; footnote omitted) (A34).

The court of appeals found a nexus between plaintiffs' allegations of price fixing and the WCIRAM bylaw provision that "the Association classifications and rates shall be binding upon all insurers." *Id.* at 1563-64 & n.20 (A25-28). But the court did not consider the following undisputed facts: (1) the quoted bylaw had been adopted some 60 years earlier;[10] (2) Minnesota law still required the filing of a rate schedule and prohibited insurers from exceeding it—so that the maximum rates and classifications were still binding on insurers by force of statute;[11] and (3) within one week after the 1979 legislative amendment upon which plaintiffs base their claim WCIRAM had informed every Minnesota insurer that they were now permitted to charge less than the maximum rates. (*See* p. 4 & n.3 *supra*.)[12]

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10. The panel recognized that the relevant bylaw had not been changed since the 1979 statutory amendment, but rejected the district court's conclusion that "the old bylaws were simply 'vestiges' of the past." 867 F.2d at 1563-64 (A26).

11. Minn. Stat. §§ 79.071, 79.11, 79.21 (1982) (A88-91). In Minnesota as elsewhere, the pricing of workers' compensation insurance was based upon a system of risk classification by which employers are grouped according to the risk of injury faced by their employees. *See* Minn. Stat. § 79.17 (1982) (A90). With WCIRAM's assistance (*see* Minn. Stat. § 79.11(2) (1982) (A89)), the insurance commissioner periodically published a schedule of rates, assigning to each job-related classification a specific dollar rate. Minn. Stat. § 79.071 (1982) (A88-89).

12. A new bylaw adopted by WCIRAM in 1982 explicitly provided that "each member shall adhere to all filings made by the Association on its behalf except to the extent that such member shall obtain the right to use departures from such filings in accordance with the requirements of law

Ultimately, however, the court of appeals' decision to reverse the district court's grant of summary judgment rested on its erroneous conclusion that WCIRAM had the power to prevent an insurer from doing business in Minnesota. The court of appeals perceived in WCIRAM's bylaws the power to expel an insurer and thereby exclude that insurer from the workers' compensation insurance market in Minnesota, 867 F.2d at 1563-66 (A25-31), notwithstanding the clear provisions of Minnesota law that it is the Commissioner of Insurance who determines whether an insurer is authorized to sell workers' compensation insurance, Minn. Stat. § 79.01(2) (A88-89), and that any insurer authorized to sell insurance is both entitled and required to belong to WCIRAM. Minn. Stat. §§ 79.11, 79.12 (1982) (A89-90). The court concluded that *whether* the supposed power to expel was intended to be used to enforce adherence with a price-fixing scheme was an "inference of motive and intent" to which plaintiffs were entitled in opposing summary judgment. *Id.* at 1564, 1566 (A26-27, A32).

In concluding that "it is a fair factual inference that WCIRAM insurers utilized the threat of bylaw-sanctioned expulsion," the court relied on the assertion that "after 1979, WCIRAM continued to fix a uniform rate to be charged by all members." 867 F.2d at 1564 (A26). The court thus drew a negative inference from the fact that, following the June 1979 statutory amendment, WCIRAM continued to set the rates that were approved by the Minnesota Commissioner of Insurance as the maximum rates, describing those rates as "uniform rate[s]". The court of appeals ignored the undeniable fact that, even after 1979, WCIRAM was *required* under Minnesota law to promulgate a single set of rates which the commissioner could adopt as the state-approved maximum

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specifically applicable thereto." 867 F.2d at 1563 n.22 (A26). Whereas the district court recognized that this provision was consistent with the 1979 statutory amendment (A77), the court of appeals held that the bylaw's explicit authorization to use "departures" did not apply to rate filings—relying on its erroneous belief that rate filings "were no longer required." 867 F.2d at 1565 (A29).

rates. Minn. Stat. § 79.21 (1982) (A90-91). And it ignored WCIRAM's prompt advice to all insurers that lower rates could be used. (*See* p. 4 & n.3 *supra.)*

The court of appeals reversed the district court's grant of summary judgment on the theory that the WCIRAM bylaws—which WCIRAM was required to promulgate and file with the Commissioner of Insurance—could be read to provide for the expulsion of any insurer who charged less than the maximum rate. As both courts below recognized, there was no evidence that any insurer had ever been expelled or threatened with expulsion for charging lower prices. The district court was unwilling to permit plaintiffs to proceed on the basis of an unsupported inference that defendants had nonetheless agreed to do so. The court of appeals reversed, without requiring plaintiffs to demonstrate that the inference of conspiracy was reasonable in light of the competing explanations of lawful, innocent (and, indeed, legally mandated) behavior in a closely regulated industry.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review and reverse a decision by a court of appeals that refused to apply the standards for summary judgment set forth in this Court's recent decisions regarding Rule 56. In reversing the district court's grant of summary judgment dismissing this antitrust class action, the Eighth Circuit cited as "particularly appropriate" this Court's statement in *Poller* that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles." 867 F.2d at 1563 n.19 (A24). The court below cited this Court's decisions in *Anderson* and *Matsushita* only once—and only in support of this proposition:

> "We need not dwell on oft-repeated standards governing summary judgments other than to observe that the non-moving party is always entitled to the benefit of all favorable inferences and that all genuine issues of fact must be resolved by a jury."

867 F.2d at 1560 (A18-19). Whereas the district court cited and correctly applied *Anderson*, *Matsushita* and *Celotex*, the court of appeals ignored the holdings of those cases—and ignored *Celotex* altogether.

In three 1986 decisions, this Court reminded litigants and the lower federal courts that summary judgment is not to be regarded as "a disfavored procedural shortcut," but "as an integral part of the Federal Rules as a whole":

> "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."

Celotex, 477 U.S. at 327. The Court held that "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," *id.* at 322; that although "the judge's function is not himself to weigh the evidence and determine the truth of the matter," summary judgment should be granted against a plaintiff who would not be entitled to go to a jury on the evidence adduced in opposition to the motion, *Anderson*, 477 U.S. at 249, 252; that the substantive law in the particular case will determine what facts are material and what evidence is relevant, *id.* at 248;[13] and that in antitrust cases, plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or

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13. Although *Matsushita* preceded *Anderson*, it likewise confirmed that the substantive law would dictate the burden the nonmovant must carry. "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." 475 U.S. at 588. Since the unwarranted finding of a conspiracy from ambiguous evidence may well "deter procompetitive conduct", *id.* at 593, the nonmovant plaintiff must come forward with evidence

collusive action that could not have harmed respondents." *Matsushita*, 475 U.S. at 588.

The court of appeals' broad reading of *Poller* is plainly improper, as this Court has twice recognized. It is settled that a plaintiff (in an antitrust case or in any other case) is not entitled to resist summary judgment on the hope that an adverse witness will confess at trial, or that the jury might disbelieve the only testimony and find for the plaintiff anyway. While Justice Black believed that a plaintiff had a right "to prove her case by impeaching [adverse] witnesses and appealing to the jury to disbelieve all that they said in the affidavits," and construed *Poller* to reflect that view,[14] the Court did not agree:

> "To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it."

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968). The Court held that "sufficient evidence supporting the claimed factual dispute [must] be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *Id.* at 289; *accord Anderson*, 477 U.S. at 256. To resist summary judgment plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Plaintiffs "must show that the inference of conspiracy is

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"'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* at 588, *quoting Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984).

14. *Adickes v. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring in the judgment); *accord First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 303-05 (Black, J., dissenting).

reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" plaintiffs. *Id.* at 588.

Both *Anderson* and *Matsushita* recognized that among the "specific facts" a nonmovant must present to resist summary judgment pursuant to Rule 56(e) are specific facts in support of its allegations of defendant's state of mind, if such allegations are necessary to its claim. As this Court wrote in *Anderson*:

> "Respondents argue, however, that . . . the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller* . . . for this proposition. We do not understand *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that a jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice."

477 U.S. at 256. In *Matsushita*, the Court concluded that the evidence of any conspiracy was ambiguous at best, *id.* at 588-93, and that there was no plausible motive for the defendants to have entered into the alleged conspiracy. *Id.* at 593-95. Contrary to plaintiffs' argument below, this Court noted that it did not mean to suggest that "the absence of any plausible motive" was the standard required to grant summary judgment:

> "We do not imply that, if petitioners had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does

> not, without more, support even an inference of conspiracy. *Id.* at 763-764. See *supra*, at 588."

Matsushita, 475 U.S. at 597 n.21.[15]

This Court's summary judgment principles have been completely ignored in this case. The court below did not require plaintiffs to come forward with evidence tending to exclude the possibility of lawful conduct; it did not consider whether the inferences it drew were reasonable in light of competing inferences; and it did not consider whether the evidence presented indicated that the defendants shared "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764.

In considering the evidence and allegations cited by the court below, it should be kept in mind that—as the district court found—plaintiffs adduced "*no evidence* . . . that any insurer was expelled from WCIRAM or prevented from selling workers' compensation insurance in Minnesota because of deviation or attempts at deviation from the rates set by the Commissioner." (A77; emphasis added) The court of appeals did not find any contrary evidence. 867 F.2d at 1562, 1567 (A21-22, A33). *None* of the court's constructions of the WCIRAM bylaws or other evidence to suggest that WCIRAM might have expelled a discounting insurer is supported by evidence that such an expulsion ever occurred—and it never did occur.

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15. In *Monsanto*, the Court held that for a terminated dealer to prevail on a claim of vertical price fixing, it would have to show more than that its dealership was terminated following complaints from competing dealers. Instead, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" 465 U.S. 752, 764 (1984), *quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). The *Monsanto* court nonetheless affirmed a jury verdict, finding "substantial *direct* evidence of agreements to maintain prices." 465 U.S. at 765 (emphasis in original).

The court's reliance on the proposition that "a Sherman Act section 1 violation may occur by mere participation in an agreement to boycott without any act of coercive enforcement occurring," 867 F.2d at 1567 (A33), was therefore misplaced. The true question here is not whether an agreement can be actionable, but whether an agreement to boycott price-cutters existed.[16] Of that there is *no* evidence, only unreasonable inference drawn by an indulgent court from innocent (and indeed, legally mandated) conduct.

First, the court of appeals construed WCIRAM's bylaws as continuing "to fix a uniform rate to be charged by all members" after partial rate deregulation in 1979. 867 F.2d at 1564 (A26). Although the court had earlier recognized that Minnesota law prohibited insurers from charging more than the maximum scheduled rate during the 1979-1983 period, 867 F.2d at 1558 (A15), it relied on the *existence* of the rate schedule (established, as it had been since 1921, by the Insurance Commissioner with WCIRAM's assistance, Minn. Stat. §§ 79.071, 79.11 (1982) (A88-89)) as evidence of an agreement to boycott. 867 F.2d at 1564 (A26). *Monsanto* and *Matsushita* plainly prohibit the panel's reliance on lawful (indeed, legally compelled) activity as a basis for an inference of an unlawful agreement.

The court below found the bylaw permitting "departures from [WCIRAM] filings" to be ambiguous, and therefore invoked rules of interpretation requiring ambiguous "contracts" to be interpreted by the jury or construed against their drafter. 867 F.2d at 1565 n.27 (A29). The correct rule, ignored by the court, is that ambiguous evidence cannot "suffice to create a triable issue of conspiracy." *Matsushita*, 475 U.S. at 597 n.21.

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16. Both district court judges below recognized that the absence of any actual enforcement activity would strongly indicate the absence of an agreement to boycott (A76-83; *see also* 574 F. Supp. at 535 n.13 (A58)), but the court of appeals viewed the district courts' reasoning as a misinterpretation of McCarran Act § 3(b), 867 F.2d at 1562 & n.17 (A22), rather than as a correct appreciation of the requirements of *Matsushita* and *Monsanto*.

Second, the court of appeals found an "agreement to boycott" in WCIRAM's supposed expulsion power, which the court found reflected in a bylaw, added in 1982, that allowed WCIRAM's directors to refer to the insurance commissioner their determination that a member was not fulfilling its membership obligations. 867 F.2d at 1565-66 & n.30 (A30-31). The district court had correctly concluded that WCIRAM could not expel a member without approval of the commissioner. Using reasoning that can only be described as bizzare, the court of appeals concluded that WCIRAM had the unreviewable power to expel an insurer for its pricing practices. Faced with a bylaw that required any resolution that a member had failed to fulfill its obligations to be submitted to the commissioner, which the court cited, 867 F.2d at 1565-66 n.30 (A30), and a statute that required WCIRAM to admit to membership any insurer authorized *by the commissioner* to write workers' compensation insurance (Minn. Stat. § 79.12 (1982) (A90)), which it ignored, the court asserted that the insurance commissioner did not have exclusive authority to expel an insurer *from WCIRAM* since such power was not conferred by statute and "the Commissioner is not a party to the WCIRAM agreement." 867 F.2d at 1566 (A30-31).[17] On the basis of this contorted reasoning—incorrect in fact since WCIRAM must submit its bylaws for the commissioner's approval, Minn. Stat. § 79.12 (1982) (A90)—the court of appeals apparently concluded that WCIRAM could expel a member without the commissioner's consent, and therefore

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17. The length to which the court went to permit the inference of unlawful intent is demonstrated by its characterization of the bylaw as requiring mere "notification of the Commissioner of the resolution to expel." 867 F.2d at 1566 (A31). In fact, the bylaws provide that any resolution that an insurer had failed to fulfill its membership obligations was to be "referred to the Commissioner of Insurance *for attention,*" 867 F.2d at 1565-66 & n.30 (emphasis added) (A31)–a procedure completely consistent with the commissioner's sole authority over the right to sell insurance, Minn. Stat. § 79.01(2) (A88-89), and therefore over WCIRAM membership, Minn. Stat. §§ 79.11, 79.12 (A89-90). No insurer could be prevented from doing business in Minnesota unless the commissioner (presumably after hearing from the insurer in question) decided to revoke its license.

could expel a member for an unlawful purpose: to enforce adherence to a supposed price-fixing scheme.[18] This supposed conspiracy–requiring the State insurance commissioner to accede to a WCIRAM boycott—is as implausible as the predatory pricing scheme alleged in *Matsushita*. 475 U.S. at 595-97.

Third, both elements of the panel's claimed "plethora of other evidence which supports an inference of an agreement to boycott," 867 F.2d at 1566 (A32), in fact relate solely to plaintiffs' price-fixing allegations, not to boycott allegations. Even if WCIRAM's policy review was conducted to assure adherence to maximum rates (of which there is no evidence), and even if WCIRAM resisted employers' requests for premium calculations based on division of payroll (an unrelated allegation, and one for which the district court found "absolutely no evidence" (A82-83)), neither plaintiffs nor the court below have suggested how those allegations can support reasonable inferences of an agreement to *boycott*—the only issue remaining in the case. WCIRAM's policy review was required by Minn. Stat. § 79.17 (1982) (A90), and the fact that it was performed cannot form the basis of an inference of unlawful activity.

The court below thus relied solely on inference, at no point supported by the sort of evidence required by *Matsushita* and *Monsanto*, to find an issue of fact as to the existence of a conspiracy to boycott price-cutters. Although no insurer was boycotted, and WCIRAM and its members never at-

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18. The panel relied on WCIRAM letters sent to insurers that had failed to subscribe to the bylaws. 867 F.2d at 1566 (A31). Those letters were not sent to price-cutters; they were sent to insurers that failed to sign subscription forms. "There is no indication in the evidence presented . . . that those who failed to sign subscription forms did so because they wanted to charge rates lower than those set by the Commissioner." (A79) *See, e.g., Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 232-33 (9th Cir. 1974) (subscription to trade association bylaws insufficient to show participation in alleged conspiracy, absent evidence that member "knowingly, intentionally and actively participated in an individual capacity in the scheme"), *cert. denied*, 421 U.S. 963 (1975).

tempted to use the WCIRAM bylaws in the manner construed by the court, the court held that those bylaws might be perceived as compelling adherence to the maximum scheduled rates and that whether anyone ever dreamed of doing so must be determined by a jury. Under no circumstances can the indulgent treatment of plaintiffs' case by the court of appeals be reconciled with this Court's decision in *Matsushita*, which specifically stated that "motive and intent," if relevant to plaintiffs' claim, are among the "specific facts" that Rule 56(e) requires plaintiff to adduce to resist a properly supported motion for summary judgment. 475 U.S. at 597 n.21.[19]

CONCLUSION

This is the kind of speculative antitrust case, based on disputed inferences rather than on evidence, that should have been foreclosed by this Court's recent decisions on summary judgment. Neither the district court nor the court of appeals could find evidence that *anyone* had actually been boycotted, coerced or intimidated by any defendant. 867 F.2d at 1562 (A21-22; *see also* A81-82). But the court of appeals concluded that a jury might find the WCIRAM bylaws—which under State law WCIRAM was required to promulgate and required to file with the Commissioner of Insurance—to be an *agreement* to boycott, coerce or intimidate. The court based this conclusion on the premise that WCIRAM had the power to expel an insurer from membership and thereby deprive that insurer of its right to do business in Minnesota—a premise directly at odds with the provisions of Minnesota law plainly stating that the Commissioner of Insurance decides who is authorized to write insurance in Minnesota.

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19. Indeed, the decision below conflicts so starkly with this Court's decisions that summary reversal may be appropriate. *See, e.g., SEC v. Otis & Co.*, 338 U.S. 843 (1949); *Helvering v. Wiese*, 292 U.S. 614 (1934). Summary vacatur might also be appropriate. *E.g., Ford Motor Co. v. Tunis Brothers Co.*, 475 U.S. 1509 (1986) (summary vacatur in light of *Matsushita*; court of appeals had reversed district court's grant of summary judgment dismissing antitrust claim).

Minn. Stat. § 79.01(2) (A88-89). From its faulty premise the court of appeals concluded that, in opposing summary judgment, plaintiffs were entitled to an inference that WCIRAM's fictitious power to expel was intended by the defendant insurance companies—who were required by State law to belong to WCIRAM—to be used to enforce adherence to the alleged price-fixing scheme. 867 F.2d at 1566 (A31-32).

The McCarran Act's purpose of exempting the regulated business of insurance from the antitrust laws will be frustrated if, as the court of appeals apparently intends, the State regulatory scheme is to be the subject of an antitrust trial. Businesses that have long been subject to a stringent state regulatory system that is becoming less stringent should not be exposed on such a flimsy basis to joint and several liability for treble damages. In particular, businesses should not be so exposed on the basis of their membership in a State-created organization to which they are required by State law to belong, and on the ambiguous provisions of that organization's bylaws, required by State law to be promulgated and filed with the State. Neither the district court nor the court of appeals found any evidence of an unlawful motive or intent on the part of defendants. The district court, properly applying the standards set by this Court, granted summary judgment. The court of appeals, ignoring those standards, reversed.

If the decision below is permitted to stand, defendants and the district court will be put to the burden and expense of trying a case for which there is no factual basis. Moreover, district court judges (at least in the Eighth Circuit) must inevitably be discouraged by what they see here: A district court judge, after faithfully applying this Court's interpretations of Rule 56, was reversed by an appeals court panel that made no mention of those interpretations and plainly did not apply them. This Court's decisions will have little impact on the efficient administration of justice in the district courts if those decisions can be ignored so cavalierly by a court of appeals that does not face the burdens faced daily by the

district courts. The Court should grant the writ and reverse the decision below in order to re-emphasize the importance of Rule 56, properly applied, to the administration of justice in the federal courts.

For the foregoing reasons, the petition for certiorari should be granted.

May 11, 1989

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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WORKERS' COMPENSATION INSURERS RATING ASSOCIATION OF MINNESOTA, *et al.*,

Petitioners,

v.

AUSTIN PRODUCTS CO., *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5378

In re Workers' Compensation Insurance Antitrust Litigation

Austin Products Co., A & M Moving & Storage Co., Tony Downs Foods Co., Butterfield Foods Co., The Diocese of Winona, Briggs Transportation Co., on behalf of themselves and all other similarly situated,

Appellants,

v.

The Workers' Compensation Insurers' Rating Association of Minnesota, The Travelers Insurance Company, Aetna Casualty & Surety Company, The Home Insurance Company, Fireman's Fund Insurance Company, St. Paul Fire & Marine Insurance Company, Employers Mutual Liability Insurance Company, Federated Mutual Insurance Company, Liberty Mutual Insurance Company, Sentry Insurance, a Mutual Company; Michigan Mutual Insurance Company, Twin City Fire Insurance Company, Excalibur Insurance Company, Continental Insurance Company, Transport Insurance Company, Employers Insurance Of Wausau, a Mutual Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court is affirmed in part, vacated in part and reversed in part in accordance with the opinion of this Court.

February 10, 1989

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

IN RE WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION

No. 87-5378

United States Court of Appeals
Eighth Circuit

Submitted: June 16, 1988
Filed: February 10, 1989

Before LAY, Chief Judge, BROWN,* Senior Circuit Judge, and BEAM, Circuit Judge.

LAY, Chief Judge.

In April 1983, the plaintiffs,[1] who are Minnesota employers, filed a complaint in federal district court alleging that the defendants, who underwrite workers' compensation insurance in Minnesota, and the Workers' Compensation Insurers Rating Association of Minnesota (WCIRAM) had entered into a cooperative agreement not to charge less than the maximum lawful rate set by the Commissioner of Insurance. The plaintiffs alleged that the agreement was illegal under both the Sherman Act, 15 U.S.C. § 1, and the Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325D.49 to 325D.66, specifically, Minn. Stat. §§ 325D.51 and 325D.53. The complaint alleged price fixing between 1979 and 1983 by the various compensation insurance carriers. The complaint asserted as well that the defendants agreed to boycott, coerce and intimidate other insurance companies and purchasers of

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* The HONORABLE JOHN R. BROWN, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

1. This is a consolidated appeal of class actions commenced by Tony Downs Foods Co., A&M Moving and Storage Co. and Austin Products, Inc. in April 1983, by the Diocese of Winona and Butterfield Foods Co. in June 1983 and by Briggs Transportation Co. in July 1984. The actions have been consolidated but the classes are not yet certified.

workers' compensation insurance in order to enforce or maintain adherence to fixed prices and to prevent competition. The defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted. Defendants asserted that their conduct was exempt from the application of the federal antitrust laws under the McCarran-Ferguson Act [hereinafter also referred to as Act]. In two separate opinions,[2] the district court held the McCarran-Ferguson Act exemption applicable in that the alleged practice constituted "the business of insurance," regulated by the state of Minnesota and that no evidence of boycott, coercion or intimidation existed. The district court therefore granted summary judgment for the defendants.[3] We reverse the grant of summary judgment on the boycott issue.

Following the passage by Congress in 1945 of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982 and Supp. 1986),[4] the Minnesota legislature passed a

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2. Defendants originally moved to dismiss under Fed. R. Civ. P. 12(b). For the purposes of the motion the defendants conceded that they had "entered into a private agreement to fix the price of workers' compensation premiums." The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota, ruled that the conduct at issue was the business of insurance and was regulated by state law. Because plaintiffs had alleged "some level of enforcement activity," the motion to dismiss was initially denied. *In re Workers' Compensation Ins. Antitrust Litig.*, 574 F. Supp. 525, 535 (D. Minn. 1983).

3. After completion of discovery, the Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, held there was not sufficient evidence of enforcement activity and that no proof of boycott existed under the 3(b) exception. He affirmed Judge Magnuson's earlier opinion that the conduct of the defendants was exempt from the federal antitrust laws under section 2(b) of the Act. *In re Workers' Compensation Ins. Antitrust Litig.*, No. 4-45-1166 (D. Minn. July 28, 1987).

4.

§ 1011. Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not

comprehensive regulatory scheme for all types of insurance sold in Minnesota. The Legislature expressed its intended exemption from the federal antitrust laws by stating:

> The purpose of this act is to regulate trade practices in the business of insurance in accordance with the intent of [C]ongress as expressed in the [McCarran Act], by defining, or providing for the determination of, all such practices in this state which constitute unfair methods

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be construed to impose any barrier to the regulation or taxation of such business by the several States. [McCarran-Ferguson Act, § 1]

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948 [McCarran-Ferguson Act § 2]

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation [McCarran-Ferguson Act § 3]

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

> of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Act of Mar. 24, 1947, ch. 129 § 1, 1947 Minn. Laws 188 (current codification at Minn. Stat. § 72A.17 (1988)). Prior to the passage of the McCarran-Ferguson Act, the Minnesota legislature had made it compulsory for all employers to carry workers' compensation. Act of Mar. 12, 1937, ch. 64, § 1, 1937 Minn. Laws 109-10 (current codification at Minn. Stat. §§ 176.021-176.031 (1988)). Until 1984, the State Commissioner of Insurance was required to "adopt a schedule of workers' compensation insurance rates for use in [the] state * * * ." Minn. Stat. § 79.071(1) (1982). Before 1979, no insurance rates could be set other than those established by WCIRAM and "approved as adequate and reasonable by the commissioner." Minn. Stat. § 79.21 (1978).

On June 7, 1979, the Legislature amended section 79.21 to allow insurers to "write insurance at rates that are lower than the rates approved by the commissioner provided the rates are not unfairly discriminatory." Minn. Stat. § 79.21 (1980). The revised statute mandated only that "[n]o insurer shall write insurance at a rate that exceeds" the Commissioner's approved rate schedule. *Id.*

The fundamental issues on appeal focus on the amendment of the Minnesota statute and whether the "deregulation" of price setting authorized by the statute was such to remove state regulation of price competition from protection by section 2(b) of the McCarran-Ferguson Act. An additional issue relates to the section 3(b) McCarran-Ferguson Act exception and whether there exists sufficient evidence of boycott, coercion or intimidation to overcome a summary judgment.

We hold, first, that the legislative amendment has not removed the state from regulation of private cooperative price fixing and that the defendants' exemption from the federal antitrust laws under section 2(b) of the Act still

applies. Second, we hold that sufficient evidence exists as to proof of an agreement to boycott under the 3(b) exception of the Act. The district court accordingly erred in holding that the exception to McCarran-Ferguson Act immunity did not apply and in granting summary judgment. We therefore reverse and remand the case for further proceedings.

We deal with the issues separately.

The Business of Insurance

A conditional predicate to exemption from the federal antitrust laws under McCarran-Ferguson Act section 2(b) is that the state law must be enacted "for the purpose of regulating the *business of insurance* * * * ." 15 U.S.C. § 1012(b) (1982 and Supp. 1987) (emphasis added). Plaintiffs urge that the challenged practice engaged in by private insurers is not the business of insurance under the tests established by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), and in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261, *reh'g denied*, 441 U.S. 917, 99 S.Ct. 2017, 60 L.Ed.2d 389 (1979). These tests require first, that the practice result in the transfer or spread of a policy holder's risk; second, that the practice be an integral part of the policy relationship between the insurer and the insured; and third, that the practice be limited to entities within the insurance industry.

The district court rejected plaintiffs' argument, relying on the statement in *Royal Drug* that "[i]t is clear from the legislative history [of the McCarran-Ferguson Act] that fixing of rates is the 'business of insurance'".[5] Plaintiffs urge that this reference to the "fixing of rates" relates to only "cooperative rate making," which involves affirmative

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5. 440 U.S. at 224 n.32, 99 S.Ct. at 1080 n.32. *See also SEC v. National Sec.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) ("Certainly the fixing of rates is part of [the] business [of insurance]; that is what *[United States v.] South-Eastern Underwriters [Ass'n*, 332 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944)], was all about.").

participation by the state. Plaintiffs urge further that a private agreement by the defendants does not involve transferring or spreading a policy holder's risk.[6] They argue that the horizontal agreement between insurers is entirely separate from their vertical contract with the policy holders. Further, they urge that these constituted factual issues in the application of the *Royal Drug* tests and that summary judgment was therefore improper. Defendants rely on many cases which have held that rate setting through a rating association is the business of insurance and is exempt under the McCarran-Ferguson Act. *See, e.g., Proctor v. State Farm Mut. Auto. Ins. Co.,* 675 F.2d 308, 321-25 (D.C. Cir.), *cert. denied*, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982) (horizontal price fixing among insurers through joint use of reimbursement formula for insurance claims is part of the business of insurance); *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218, 225-26 (3d Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 631 (1981) (joint rate setting and risk classification through rating association are the business of insurance); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971) (fixing of automobile insurance premiums by rating organization and its members is part of the business of insurance), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F.Supp. 564, 572-75 (E.D. Pa. 1974) (conspiracy among insurance companies and their rating association to fix title insurance sellers' charge is part of the business of insurance); *California League of Indep. Ins. Producers v. Aetna Casualty & Sur. Co.*, 179 F.Supp. 65 (N.D. Cal. 1959) (price fixing of commissions to be paid insurance agents is part of the business of insurance).[7] Aside from the

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6. Justice Brennan made the same argument, dissenting in *Royal Drug,* 440 U.S. at 244, 99 S.Ct. at 1089.

7. Defendants emphasize that the plaintiffs initially concede that rate setting when authorized by the state is the business of insurance. Under such circumstances it makes little sense to say that cooperative rate setting, without state involvement, is not within the business of insurance. It is the setting of the rates which constitutes the business of insurance. This char-

support for the defendants' position found in *Royal Drug* and *National Securities*, we find that fixing of rates by the compensation carriers, whether by private or by state-approved rate setting, is integral to the price charged to policy holders and to the contractual relationship with the insured. Although a price fixing agreement may maximize profit, it is axiomatic that the fixing of rates is central to transferring and spreading the insurance risk. As has been noted, "[t]he classic market means of changing the size of customer pools would be through price changes." Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason,* 27 UCLA L. Rev. 265, 283 (1979) [hereinafter Sullivan & Wiley]. The legislative history shows that private rate setting activity was the focus of the "business of insurance" at issue in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). President Franklin D. Roosevelt stated: "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States." *Royal Drug*, 440 U.S. at 224, 99 S.Ct. at 1079 (Stewart, J.) (citing S. Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt, 1944-45* at 587 (1950)).

We are satisfied that the district court was correct in finding that the alleged private rate setting by the defendant companies fell within the McCarran-Ferguson Act 2(a) provision relating to the business of insurance.

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acterization is not dependent upon the identity of the rate setters. Plaintiffs deny such a concession. They urge, however, that the cooperative exchange of information among insurers within the state-sanctioned rate making process is arguably the business of insurance since it relates to transferring and spreading the risk. Plaintiffs argue that the "charging" of uniform rates before 1979 was exempt from the Sherman Act under the "state action" doctrine (relying upon *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985)) and not under the McCarran-Ferguson Act. Although plausible, no authority supports this argument.

We now turn to the issue of whether the alleged practice of private cooperative rate setting by defendant insurers is still regulated by the state in light of the 1979 Minnesota amendment.

State Regulation

The district court found sufficient state regulation of workers' compensation rates to require exemption from the antitrust laws under McCarran-Ferguson Act section 2(b). Plaintiffs urge that the court erred in that the issue is not whether the regulation was *adequate* but whether Minnesota's 1979 amendment has withdrawn regulation of rate fixing altogether.

The 1979 amendment to Minnesota Statute section 79.21 provided that insurers "may write insurance at rates that are lower than the rates approved by the commissioner provided the rates are not unfairly discriminatory." Defendants assert that the state still retained regulation of rate setting practices under section 79.071(1), which required the Commissioner to "adopt a schedule of workers' compensation insurance rates for use in [the] state" which "shall not be excessive, inadequate, or unfairly discriminatory." In addition, defendants urge that Minnesota Statute section 72A.25[8] bestowed upon the Commissioner specific authority over "any person engaged in the business of insurance * * *" participating in any "method of competition [that] is unfair or * * * [any] act or practice [that] is unfair or deceptive * * *." Defendants urge that this comprehensive scheme provided the Commissioner with specific authority to regulate private cooperative rate setting activity.

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8. Minn. Stat. § 72A.25 (1984) (in force throughout the relevant time period) reads in part:

Unfair competition

Subdivision 1. Statement of charges; service; hearing. Whenever the commissioner has reason to believe that any person engaged in the business of insurance is engaged in this state in any

In finding that the rate setting practices were exempt under section 2(b), the district court relied principally upon the reasoning of *FTC v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); this circuit's *Lawyers Title Co. of Mo. v. St. Paul Title Ins. Corp.*, 526 F.2d 795 (8th Cir. 1975); *Dexter v. Equitable Life Assurance Soc'y of the United States*, 527 F.2d 233 (2d Cir. 1975),[9] and *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir. 1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). The court concluded that section 72A.17 and chapter 79 in its entirety demonstrate that the legislature intended to occupy the field by defining and prohibiting activity it considered to be either an unfair method of competition or a deceptive practice. The district court concluded that the

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method of competition or in any act or practice in the conduct of that business which is not defined in section 72A.20, that said method of competition is unfair or that said act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon that person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than 20 days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section 72A.22, and the provisions of that section as to service are made applicable to proceedings under this section. Upon good cause shown, the commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person. The commissioner shall, after the hearing, make a report in writing in which he shall state his findings as to the facts and shall serve a copy thereof upon the person upon whom he served his statement of charges.

Other subdivisions of the statute outline judicial enforcement measures to be initiated by joint action of the insurance commissioner and the state attorney general.

9. As Judge Feinberg observed:

State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit. The McCarran Ferguson Act clearly contemplates that where a state undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws; if the

insurance commissioner had been given broad powers over the activities of individual companies and rating associations and therefore found that Minnesota regulated insurance for McCarran-Ferguson Act purposes.

We find plaintiffs' argument that the state has withdrawn regulation of rates goes too far. In 1979, the Minnesota legislature determined that uniform rate setting by the Commissioner would cease. It is true the State of Minnesota determined to promote price competition by leaving to the insurers' competitive judgment the setting of workers' compensation insurance rates below the allowable maximum. However, this policy change did not repeal the Commissioner's supervisory authority over rate setting practices. In section 72A.21, the Commissioner retained the "power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether that person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section 72A.19."[10] One cannot reasonably argue that the use of illegal price fixing as alleged by plaintiffs' complaint is not an unfair method of competition. *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972) (horizontal restraints on trade are *per se* violations of the Sherman Act); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28, 97 S.Ct. 2549, 2561 n.28,

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exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate the antitrust laws, the state regulation which the McCarran-Ferguson Act aims to foster, 15 U.S.C. §§ 1011, 1012(a), would be a nullity.

Dexter, 527 F.2d at 236.

10. Minn. Stat. § 72A.19 (1984) states in part:

Unfair methods and unfair or deceptive acts and practices prohibited

Subdivision 1. No person shall engage in this state in any trade practice which is defined in sections 72A.17 to 72A.32 * * * to be an

53 L.Ed.2d 568 (1977) (horizontal restrictions between retailers are per se violations). The phrase "unfair method of competition" deserves to be given a common meaning. In addition to the above considerations, the amendment to section 79.21 provides that the Commissioner shall set the maximum rate and that any rate used shall not be excessive or unfairly discriminatory. Thus, these provisions show that the Commissioner still retains the general power to regulate rates. Equally significant, we find nothing within section 79.21 which indicates that Minnesota has withdrawn the Commissioner's authority to supervise unfair methods of competition. Thus, we find that the Commissioner continues to regulate rate setting practices in the state.

The argument is made by commentators (and is inferentially relied upon by plaintiffs) that the state unfair methods of competition statute and the model unfair trade practices act are not regulatory laws intended to exempt the applicability of the federal antitrust laws.[11] *See* Sullivan &

> unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

Minn. Stat. § 72A. 20 (1984) defines unfair or deceptive methods, acts or practices. Subdivision 4 specifically defines boycott, coercion and intimidation as unfair method or practices:

> Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation, resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance, shall constitute an unfair method of competition and an unfair and deceptive act or practice.

However, this specific prohibition does not limit unfair methods of competition solely to the use of boycotts. *Cf. Dexter*, 527 F.2d at 236.

11. A similar argument is extended to the nonapplicability of state antitrust laws: that is, they were not passed to regulate the business of insurance. They therefore simply serve to accommodate rather than to preempt the federal antitrust laws under the McCarran-Ferguson Act. *See* Weller I at 431-38. *But cf. Royal Drug*, 440 U.S. at 247, 99 S.Ct. at 1091 (Brennan, J., dissenting) (citing *SEC v. National Sec.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969)) ("Statutes aimed at protecting or regulating [insurance company—policy holder] relationships, directly or

Wiley at 289-90; Weller, *To Preempt or to Accommodate: The question of State and Federal Antitrust Laws Under the McCarran-Ferguson Act*, 9 U. Tol. L. Rev. 421, 424-25 (1978) [hereinafter Weller I]; Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587, 606-14 [hereinafter Weller II]. Commentators insist that *Dexter*, *Ohio AFL-CIO* and *Lawyers Title* are poorly analyzed in relying upon state unfair trade practice acts. It is urged that such laws do not serve to "impair, invalidate or supercede" state laws and that they are not regulatory in nature. Also, it is asserted that they should be read merely to accommodate federal antitrust laws and not to preempt. Plaintiffs make historical arguments that such laws were not intended to serve as regulation under the McCarran-Ferguson Act.[12] Furthermore, plaintiffs argue that incorporation of state unfair methods of competition statutes within the enforcement powers of the state insurance commissioner should not override the original purposes of the Act. The legislative history of the McCarran-Ferguson Act strongly suggests that this is not the type of state regulatory control originally contemplated.

Although some of these arguments contain logical appeal, we find them unpersuasive. In *FTC v. National Casualty*, 357 U.S. 560, 78 S.Ct. 1260, the Supreme Court applied general language from a state unfair practice act to preclude the FTC from exercising control over deceptive advertising practices. It has been urged that *FTC v. National Casualty* should be limited to its facts and that such an interpretation should be limited only to the applicability of the FTC Act and not the Sherman Act. *See* Sullivan & Wiley

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indirectly, are laws regulating the 'business of insurance.'"); "[W]here a State enacts its own antitrust laws conferring § 2(b) immunity, § 3(b) retains Sherman Act coverage for those especially 'destructive . . . practices.'" *Barry*, 438 U.S. at 566, 98 S.Ct. at 2942 (Stewart, J., dissenting) (citing *South-Eastern Underwriters*, 322 U.S. at 562, 64 S.Ct. at 1178).

12. For an excellent and complete legislative history of the McCarran Act, *see generally* Weller II.

at 289 n.116; Weller I at 445-49. We decline such an invitation. The fundamental issue is whether a general prohibition providing an insurance commissioner with authority under a state unfair method of competition or unfair practice act is regulation under the McCarran-Ferguson Act. In *FTC v. National Casualty* the Supreme Court held such a provision to be sufficient regulation of the business of insurance to exempt the application of the FTC Act.[13] It would be highly incongruous to reason that a general provision may be regulatory for the purposes of exempting the FTC Act and not the Sherman Act. Such an interpretation lies not within the authority of lower courts. As the state regulation does not appear in the form of state rate setting, as contemplated by the McCarran-Ferguson Act, the alleged price fixing agreement would appear to violate federal law. However, the reason the defendants are not subject to *per se* liability for price fixing under the federal antitrust laws is because the state has retained "inchoate" regulation over unfair methods of competition. *FTC v. National Casualty*, 357 U S. at 564-65, 78 S.Ct. at 1262.

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13. Justice Stewart, dissenting in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978), explained:

> *FTC v. National Casualty Co.*, * * * is the only case in this Court involving [to what extent a state must regulate the "business of insurance" to pre-empt the federal antitrust laws]. There, the Court held that the state statutes "prohibiting unfair and deceptive insurance practices," preempted Federal Trade Commission regulations "prohibiting respondent insurance companies from carrying on certain advertising practices found by the Commission to be false, misleading, and deceptive, in violation of the Federal Trade Commission Act . . . ." Noting that no one had alleged that the state regulation was "mere pretense," the Court rejected the FTC's argument that the state regulation was "too 'inchoate' to be 'regulation' until [the state's statutory] prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases.'"

438 U.S. at 557 n.4, 98 S.Ct. at 2938 n.4 (Stewart, J., dissenting) (citations omitted).

Thus, we find that the State of Minnesota provides the Insurance Commissioner with regulatory authority over unfair methods of competition. The amendment to section 79.21 allowing private rate setting does not divest the Commissioner of this regulatory power. Under such circumstances we find that the application of the federal antitrust laws is suspended under section 2(b) of the McCarran-Ferguson Act. The federal antitrust laws therefore do not apply to the alleged rate fixing practices of the defendant workers' compensation insurance carriers.

The Agreement to Boycott

Section 3(b) of the McCarran-Ferguson Act provides an exception to immunity from the antitrust law when the state has regulated the business of insurance. If there exists any agreement to or act of "boycott, coercion or intimidation," the exemption is lost. As stated in *Barry*:

> The [McCarran-Ferguson Act] debates make clear that the "boycott" exception was viewed by the Act's proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action.

438 U.S. at 547, 98 S.Ct. at 2932.

Plaintiffs urge that at the very least their evidence demonstrates that defendants have entered into restrictive agreements to boycott and have engaged in acts of coercion and intimidation in enforcing an illegal price fixing agreement. After discovery, the district court awarded summary judgment to the defendant compa[illegible]es, holding as a matter of law that no evidence of a boycott agreement or act exists.

The issue we face on appeal is whether plaintiffs' proof is sufficient to overcome a motion for summary judgment. We

need not dwell on oft-repeated standards governing summary judgments other than to observe that the non-moving party is always entitled to the benefit of all favorable inferences and that all genuine issues of fact must be resolved by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 106 S.Ct. 2505, 2509-11, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-1357, 89 L.Ed.2d 538 (1986). The plaintiffs may not rely upon mere allegations or denials in their pleadings, but the overall record must be evaluated in determining whether summary judgment should be granted. *See Robinson v. Monaghan*, 864 F.2d 622 (8th Cir. 1989).

Our review of the overall record convinces us that the district court erred in granting summary judgment under the McCarran-Ferguson Act section 3(b) exception to antitrust immunity. In providing plaintiffs all favorable inferences, we find sufficient evidence to create genuine issues of fact as to whether the defendants entered into an agreement or acted to boycott, coerce or intimidate workers' compensation insurers to agree to enforce a uniform rate for workers' compensation insurance from 1979 to 1983 in Minnesota. In holding that there was insufficient evidence that defendants entered into an agreement to or committed an act of boycott, the district court found the following: (1) that evidence of ordinary price fixing, without enforcement activity, does not constitute a boycott (*see St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 545 n.18, 98 S.Ct. 2923, 2932 n.18, 57 L.Ed.2d 932 (1978)) and (2) that plaintiffs' evidence of enforcement activity – (a) WCIRAM bylaws, (b) WCIRAM subscription forms, (c) WCIRAM circular letters, (d) WCIRAM insurance policy reviews and (e) WCIRAM policy prohibiting division of payroll – is insufficient to provide the necessary inference of an agreement to or act of boycott.

With all due respect, our reading of the record causes us to disagree with the district court. We find sufficient evidence, if unrebutted or if believed, that would clearly justify a jury finding that during the relevant time period an

illegal boycott agreement existed between WCIRAM and its members in violation of the federal antitrust laws.

We begin our discussion with the basic understanding of the term "boycott." The Supreme Court has recently defined boycott as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *Barry*, 438 U.S. at 541, 98 S.Ct. at 2930 (footnote omitted). The Court indicated that for McCarran-Ferguson Act purposes, the terms boycott, coercion and intimidation should be given meanings consistent with their traditional Sherman Act usage. *Id.*[14]

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14. The term boycott has a long tradition of usage. As stated in an early case: "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 437, 31 S.Ct. 492, 496, 55 L.Ed. 797 (1911). The First Circuit has said: "The classic anticompetitive 'group boycott' is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek to compete at that level." *Allied Internat'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981), *aff'd*, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982) (citation omitted). The Third Circuit has provided another description: "'[C]lassic' boycotts [include those] in which a group of business competitors seek[s] to benefit economically by excluding other competitors from the market place. 'The crucial element' in such boycotts, according to Professor Sullivan, 'is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete.'" *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 429-30 (3d Cir.), *cert. denied*, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982).

The Supreme Court has held that the means used to restrain competition were irrelevant. *See Gompers*, 221 U.S. at 438, 31 S.Ct. at 496. *See also American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S.Ct. 1125, 1138, 90 L.Ed. 1575 (1946). What is important is that an anticompetitive motive propel the actions. "'In each of [the] cases [finding an illegal boycott] the aim and purpose of the group boycott or refusal to deal was either to compel the object of the boycott to adopt a certain standard of trade practice, or to exclude him from competition.'" *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 979 (1st Cir. 1984) (citation omitted). *See also American Tobacco*, 328 U.S. at 809, 66 S.Ct. at 1138 ("It

It is also clear that under the 3(b) exception, exposure of the companies to antitrust liability (notwithstanding state regulation) does not swallow the section 2(b) exemption. Thus, under the McCarran-Ferguson Act, the boycott definition is not coextensive with the prohibitions of the Sherman Act. *Barry*, 438 U.S. at 545 n.18, 98 S.Ct. at 2932 n.18. Thus, we agree with the district court that the practice of mere price fixing, *i.e.*, a refusal to deal except at a specified price, without more, is not within the confines of the term boycott under the McCarran-Ferguson Act. [15]

The district court's basic conclusion rests on the fact that defendants' acts did not go beyond mere price fixing and that "there is no evidence of any enforcement acts beyond a reluctance to sell except at a specified price." 1987 Order at 22.

The district court added that "[e]ven if the Court were to construe the articles and bylaws as potential means to

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is not the form of the combination or the particular means used but the result to be achieved that the statute condemns.").

Similarly, it matters not whether the actions *currently* restrain competition, if they pose the threat of future trade restraint: "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59, 60 S.Ct. 811, 846 n.59, 84 L.Ed. 1129 (1940). *Accord Associated Press v. United States*, 326 U.S. 1, 12, 65 S.Ct. 1416, 1420, 89 L.Ed. 2013 (1945). The rationale for this is that "we [cannot] be certain that the challenged practice, though not destructive of existing competition, did not abort yet unborn competitors equally within the concern of the Sherman Act." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 622, 73 S.Ct. 872, 887, 97 L.Ed. 1277 (1953). *See also United States v. Griffith*, 334 U.S. 100, 107 (1948); *American Tobacco*, 328 U.S. at 814, 66 S.Ct. at 1141.

15. Plaintiffs rely upon the meaning of the additional words coercion and intimidation set forth in § 3(b). We see no reason why those words should not enjoy their ordinary meanings. Whether they may include activity short of proof of an agreement to boycott is not necessary for us to decide. We find ample evidence of a boycott and such evidence clearly supports agreements and acts to coerce and intimidate under the Act.

enforce an alleged price fixing agreement,[16] there is nothing to suggest those means were successful." 1987 Order at 15. The court continued: "Defendants have made no use of any enforcement means purportedly at their disposal; without doing so, no restraint on trade can occur." *Id.*[17]

We find such reasoning overlooks the section 3(b) exception that an agreement to boycott is as much illegal as is an act of boycott.[18] As the Supreme Court stated in a different context, although applicable here:

> No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the

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16. One type of conduct which has been found subject to Sherman Act scrutiny is the enforcement of an association's rules. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 686, 98 S.Ct. 1355, 1362, 55 L.Ed.2d 637 (1978); *Associated Press*, 326 U.S. at 12, 65 S.Ct. at 1420; *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 432 (3d Cir. 1982), *citing Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 522-23 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980); *United States Trotting Ass'n v. Chicago Downs Ass'n Inc.*, 665 F.2d 781, 788 (7th Cir. 1981). *Cf. Moore v. Boating Indus. Ass'ns*, 754 F.2d 698, 706 (7th Cir. 1985).

17. The court's reasoning became apparent in its question during oral argument: "The issue I am concerned with here is where is the blood? Who was coerced? Who suffered at the hands of a concerted conspiratorial activity? What insurance policies were forced to be rated and priced at a higher rate? Show me the body." Brief for Appellee at 38, *In re Workers' Compensation Litig.* (8th Cir.) (No. 87-5378) [hereinafter Brief for Appellee].

18. As Judge Greene stated in *United States v. National Assoc. of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982):

> Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. *United States v. Schrader's Son, [Inc.]*, 252 U.S. 85, [99-100, 40 S.Ct. 251, 253, 64 L.Ed. 471 (1920)]. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement, the conclusion that a conspiracy is established is justified. Neither proof of exertion of the power to exclude nor proof of actual exclusion of existing or potential competitors is essential to sustain a charge of monopolization under the Sherman Act.

American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946).

Plaintiffs' evidence supports a finding of private cooperative price fixing (admitted by defendants for purposes of summary judgment). Additionally, we find sufficient evidence that a jury could reasonably find that an express agreement existed to exclude insurers from WCIRAM membership if the prescribed rates were not utilized, as well as acts of intimidation and coercion to maintain uniform rates by all workers' compensation carriers. All carriers knew that expulsion from WCIRAM carried with it the threat, if not the express statutory requirement, that a carrier could no longer underwrite workers' compensation insurance in Minnesota.

> [I]t is well established that the parties to an agreement which *per se* violates the antitrust laws may not defend on the basis that they have applied no coercion to bring about adherence to the combination or to compel obedience to its terms.
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> * * * *
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> It is, indeed, difficult to see why legal unenforceability or lack of formal sanctions should be considered a valid defense. Combinations of entities which fix prices, manipulate supplies, or engage in other anticompetitive conduct are almost always "voluntary" in the sense that a recalcitrant co-conspirator cannot be required, in a court of law, to keep his bargain. But that lack of legally-enforceable coer-

We turn now to our discussion of the evidence. Although we compartmentalize our discussion, as did the district court, we emphasize that a piece-meal analysis must be avoided and the overall conduct of the defendants must be weighed in determining whether there exists sufficient proof of motive and intent to overcome a summary judgment. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1193, 1207-08 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983).[19]

WCIRAM was organized as a rate setting and classification bureau by the Minnesota legislature in 1921. *See* Act of Mar. 15, 1921, ch. 85 § 11, 1921 Minn. Laws 134. Since that time, WCIRAM membership has been required for a carrier to participate in the business of underwriting workers' compensation insurance in Minnesota. Until 1979, the Insurance Commissioner generally set the rates for all workers' compensation carriers. In 1979, the Minnesota legislature amended the workers' compensation statutes to allow rates to be set by individual insurers below the Commissioner's set maximum. Act of May 30, 1979, ch. 271

> cion—needless to say—does not establish a defense under the antitrust laws.

Id. at 163-64.

19. Particularly appropriate is the Supreme Court's following statement:

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted).

§ 2, 1979 Minn. Laws 592; Act of June 7, 1979, ch. 3 § 11, Extra Sess. 1979 Minn. Laws 1261 (codified at Minnesota Statute section 79.21 (1980)). WCIRAM's bylaws were not immediately changed in response to the amendments. WCIRAM's bylaws applicable from June 8, 1979, to January 26, 1982, allowed the association to set rates for all carriers[20] and required adherence to such rates by all carriers as a condition of WCIRAM membership.[21] In 1982, the bylaws were amended to permit member insurers to depart from the

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20. The articles provided in relevant part:

Article VI - Powers of the Rates and Classification Committee

The Rates and Classification Committee shall have the authority in [sic] behalf of the Association to classify and rate all workers' compensation risks in the state of Minnesota. It shall adopt appropriate rules and regulations and a manual of rules, classifications and rates for the underwriting of such risks and systems for the merit rating.

* * * *

Article XI - Services of Association

4. "The Association classifications and rates shall be binding upon all insurers . . . ."

Joint Appendix at 264-65, *In re Workers' Compensation Litig.*, (8th Cir.) (No. 87-5378) [hereinafter Joint Appendix].

21. Those same bylaws also provided:

Article IX - President

4. The President shall enforce these Articles and Bylaws and all rules and regulations of the Association.

* * * *

Article XV - Withdrawals

2. No member shall be entitled to any refund of any portion of its minimum assessment by reason of its withdrawal or expulsion from the Association.

Joint Appendix at 264-65.

association's filings "in accordance with the requirements of law * * *."[22]

The district court held that between 1979 and 1982, absent evidence of expulsion, there was no intent to boycott members from WCIRAM because the old bylaws were simply "vestiges" of the past when uniform rate setting was done jointly by WCIRAM and the commissioner. The court also found that nothing in the 1982 articles and bylaws made the rates binding on all insurers because "departures" from filings were permitted. The court reasoned that the filing-departure provision was in conformity with the 1979 amendment allowing competitive pricing.

The district court's conclusion overlooks several factors which a trier of fact could weigh in determining the existence of an agreement to boycott, coerce or intimidate. The available inferences, which must favor the plaintiffs' position, support a holding contrary to that of the district court. First, it is alleged (and verified by affidavit)[23] that after 1979, WCIRAM continued to fix a uniform rate to be charged by all members. Second, plaintiffs assert that statements by officers of WCIRAM member insurers provided admissions that a uniform rate was still necessary in carrying on a viable workers' compensation insurance business in Minnesota and that the competitive rate policy set by the Legislature (deviation from fixed rates) was detrimental to the defendant-insurers' interests. Third, efforts to enforce uniform rate adherence continued notwithstanding the pro-competitive amendment of section 79.21. Under such circumstances, it is a fair factual inference that WCIRAM

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22. The January 26, 1982, amendments to the WCIRAM Articles of Association and Bylaws included an amendment to Article III section 2(c): "Each member shall [a]dhere to all filings made by the Association on its behalf except to the extent that such member shall obtain the right to use departures from such filings in accordance with the requirements of law specifically applicable thereto[.]" Joint Appendix at 265-66.

23. *See* Brief for Appellant at 10, *In re Workers' Compensation Litig.*, (8th Cir.) (No. 87-5378) [hereinafter Brief for Appellant].

insurers utilized the threat of bylaw-sanctioned expulsion from WCIRAM to achieve adherence to uniform price fixing notwithstanding an explicit state declaration favoring competitive pricing.

The 1982 bylaws support this conclusion and do not detract from it. The language of Article XII of the 1982 bylaws is identical to provisions contained in the 1979 and 1981 bylaws. Article XII subsection (4) of the 1982 bylaws provides: "The Association classifications and rates shall be binding upon all insurers." Joint Appendix at 267. Further intent to continue uniform rate enforcement is found in the synopsis of the proposed 1982 articles sent by WCIRAM to its members which stated that the new Article XII "[r]eplaces former Article XI[24] without change." Joint Appendix at 453. The 1981 version of the articles also contains the following:

> **Article II Object**
>
> The Association shall be maintained for the following purposes:
>
> 1. To make classifications, rules, rates, rating plans, policy forms and endorsements.
>
> * * * * * *
>
> **Article VI Rates Committee**
>
> 3. The Rates Committee shall have full operational responsibility for all matters relating to pricing activities, forms, manuals and methods for collecting and reporting statistical data.

Joint Appendix at 455, 458-59.

A subscription agreement was attached to the copy of the bylaws sent to each WCIRAM member insurer. Each company was to execute the subscription form, which read in part that each subscribing insurer agreed "to observe and to

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24. *See supra* n.20 for relevant portions of former Article XI.

be bound by the * * * rates * * * of the Workers' Compensation Insurers Rating Association of Minnesota." Joint Appendix at 271 (reproduced copy of WCIRAM subscription form). The plaintiffs assert that WCIRAM's rates were the same as the maximum rates permitted by the Commissioner.[25]

The synopsis of the 1982 revised articles also provides: "This Article [III] also includes provision for expulsion of members not fulfilling their obligations." Joint Appendix at 452. This provides convincing evidence that under WCIRAM's own interpretation of the bylaws, expulsion was available to sanction members refusing to adhere to maximum rates.

The district court emphasized that under Article III 2(c) of the 1982 bylaws each WCIRAM member had the "right to use departures from such filings in accordance with the regulations of law specifically applicable thereto[.]" The court found that this indicates that WCIRAM's classification and rates were thus not binding on

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25. Brief for Appellant at 12. WCIRAM President Hildebrandt's deposition recited:

> Q. Mr. Hildebrandt, why did the Rating Association require a signature on the subscription form from any insurer?
>
> A. We felt that that made the — excuse me, bound the carrier as the subscription form states, to be responsible for paying assessments, doing the other things that the Articles of Association say they must do in order to maintain membership.
>
> Q. Including observing and being bound by the rules, rates and regulations of the Rating Association?
>
> A. Yes.
>
> Q. Mr. Hildebrandt, would you agree with the statement that this subscription form, requiring the signature on the subscription form is a method of enforcing the Articles and Bylaws of the Rating Association?
>
> A. I think it's that and something else, yes.

Id. at 13.

all insurers and were compatible with the amendments to Minnesota Statute section 79.21 allowing price competition. Although we generally give deference to its interpretation, we hold that the district court has misinterpreted Article III 2(c).[26]

Article III 2(c) must be read in the context of all coexisting articles. Fundamental rules of construction counsel that each clause should be interpreted to be given effect. If possible, all clauses should be construed as consistent with other clauses.[27] Article XII was moved from Article XI without change and reads in relevant part: "The Association classifications and rates shall be binding upon all insurers." Joint Appendix at 267.

The plaintiffs' evidence shows that the Insurance Commissioner stated that compensation insurance carriers were not required to file rates with the Insurance Division after June 7, 1979.[28] We find that Article III 2(c) relates to required filing of policy forms, statistical plans, and so forth. It cannot reasonably be intended to refer to deviations from rate filings since such filings were no longer required.

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26. The text of Article III 2(c) appears *supra* n.22.

27. The bylaws are subject to judicial interpretation just as is any other contract. Each bylaw must be construed within the four corners of the agreement. "It is fundamental to contract interpretation that we must construe the contract as a whole and attempt to give meaning to all parts, consistently with one another." *Corso v. Creighton Univ.*, 731 F.2d 529, 532 (8th Cir. 1984). *Accord United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986). If the contract language is ambiguous "its meaning becomes a question of fact for the jury." *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local #433*, 826 F.2d 755, 764 (8th Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 1019, 98 L.Ed.2d 984 (1988). Further, the meaning of ambiguous terms should be construed against the drafter. *Chauffeurs, Teamsters & Helpers, Local Union 238 v. C.R.S.T., Inc.*, 780 F.2d 379, 382, 384 (8th Cir.1985), *rev'd on other grounds on reh'g*, 795 F.2d 1400 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 647, 93 L.Ed.2d 702 (1986).

28. Brief for Appellant at 48.

The 1979 articles referred to the President's enforcement obligations. Article IX(4) stated: "The President shall enforce these Articles and Bylaws and all rules and regulations of the Association." Joint Appendix at 264-65. Those rules included adherence to WCIRAM's set rate schedule. *See supra* note 20. This version of the articles mentioned expulsion of members only in passing.[29]

The January 26, 1982, bylaws amendments for the first time provided that any WCIRAM board decision to expel must be referred to the Minnesota Insurance Commissioner.[30]

The district court held that WCIRAM lacked the power to expel any member for non-adherence to the bylaws. We must respectfully disagree.

To construe Article III(4) to mean that the Association lacked the power to expel would require a holding that only the Commissioner had the power to expel a member from

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29. Article XV, (2) concerning withdrawals, read: "No member shall be entitled to any refund of any portion of its minimum assessment by reason of its withdrawal or expulsion from the Association." Joint Appendix at 265.

30. Article III - Membership

* * * *

4. A member may continue as such only so long as the obligations attendant upon membership status are fulfilled. A resolution to the effect that such obligations are not being fulfilled by a designated member may be presented to the Board of Directors at any meeting thereof by the President or by any member but a vote on such resolution shall not be taken until the member has received a copy of the resolution and been given an opportunity for a hearing before the Board of Directors and shall not be adopted unless there are at least five affirmative votes nor unless notice that such resolution is to be considered by the Board of Directors has been given to the members of the said Board and to the designated member at least twenty (20) days prior to the meeting at which the vote on such resolution is to be taken. *Such resolution, if adopted, shall be referred to the Commissioner of Insurance for attention.*

Joint Appendix at 265-66 (emphasis added).

WCIRAM. The articles do not provide the Commissioner with such a power. The Commissioner is not a party to the WCIRAM agreement. Nothing in either the statute or the bylaws provides the Commissioner with exclusive expulsion authority.

However, even if the defendants' interpretation is correct, a fact finder could reasonably construe other evidence of threats and intimidation by WCIRAM that it possessed the power to expel from its membership those companies who refused to adhere to the fixed rates set by WCIRAM. The fact that insurance companies may have had a legal right to deviate from the set rates does not diminish the threat of expulsion by WCIRAM if a company refused to comply with the fixed rate. Certainly, the conduct of WCIRAM would not provide an insurer any assurance that expulsion was unavailable as a possible sanction for non-compliance with the bylaws. In this regard, President John Hildebrandt, representing WCIRAM, sent a letter to non-subscribers on April 13, 1983. He stated in part: "This letter will serve as notice that your company's membership will be terminated as of May 15, 1983 in absence of the signed Articles." Joint Appendix at 445. WCIRAM sent circular letters to all members directing the utilization of WCIRAM's rates.[31]

In sum, the bylaws speak for themselves: if a member fails to fulfill any of its obligations, including adherence to fixed rates by WCIRAM (as required by Articles III(4), VI and XII(4)), its membership is to be terminated. Notification of the Commissioner of the resolution to expel is prescribed by the bylaws. There is nothing within either the bylaws or the statutes which provides any other procedure for

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31. These rates were consistently set at the maximum allowable. Reply Brief for Appellant at 25 n.17, *In re Workers' Compensation Litig.*, (8th Cir.) (No. 83-5378). Insurers represented to their policyholders that they were bound to abide by the rates of the "regulatory authority * * *by law." Joint Appendix at 315 (Letter from CNA Insurance Company to Union Scrap Iron and Metal company (Mar. 24, 1983)).

expulsion. Under the statutes it would seem clear that if an insurance company is not a WCIRAM member, the company can no longer continue to underwrite workers' compensation insurance in Minnesota. *See* Minn. Stat. § 79.11.

We find a plethora of other evidence which supports an inference of an agreement to boycott, coerce or intimidate companies into adherence to a fixed price.

There is evidence that WCIRAM reviewed each policy to see that a company applied the "correct rate." If a rate deviated from the uniform rate, a "policy correction" notice would be issued disapproving such rate. As plaintiffs point out, as late as November 12, 1981, minutes of a WCIRAM task force meeting recited: "Association staff noted that the emergence of both classification and rate deviation may change the future focus of their 'policing' activities. Presently a good deal of effort is expended in reviewing policies at issuance for conformance with classes, rates, and rating factors which are all standardized thru [sic] the Basic Manuals." Joint Appendix at 434.

In 1979, the legislature passed section 79.211 subdivision 2 which provided: "**Division of payroll**. An insurer shall permit an employer to divide his payroll among the rating classifications most closely fitting the work actually performed for purposes of premium calculation when the employer's records provide adequate support for a division." Thus, price competition under section 79.211(2) necessarily required that an employer be permitted to divide its payroll among employee classifications reflecting different specific (and frequently lower) rates. Despite this legislative mandate, employer and insurer payroll division requests to WCIRAM were denied. The evidence shows that WCIRAM resisted these efforts.[32]

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32. Plaintiffs assert that in 1981 WCIRAM was removed from involvement in division of the payroll by amendment to 79.211(2). *See* Brief for Appellant at 20. There is evidence that WCIRAM adopted other means to circumvent the law and to resist payroll division. *Id.* at 20 & n.23.

Last, we disagree with defendants' claim that without evidence of enforcement (namely, expulsion) no restraint of trade can be shown. As indicated, section 3(b) speaks not only of acts of boycott but also of agreements to boycott. It is well settled that a Sherman Act section 1 violation may occur by mere participation in an agreement to boycott without any act of coercive enforcement occurring. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984); *see also United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489, 70 S.Ct. 711, 714, 94 L.Ed. 1007 (1950), *American Tobacco Co. v. United States,* 328 U.S. 781, 809-10, 66 S.Ct. 1125, 1138-39, 90 L.Ed. 1575 (1946); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 224 n.59, 60 S.Ct. 811, 845 n.59, 84 L.Ed. 1129 (1940); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614, 34 S.Ct. 951, 955, 58 L.Ed. 1490 (1914); *Southway Theatres Inc. v. Georgia Theatre Co.,* 672 F.2d 485, 492 (5th Cir. Unit B 1982); *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467, 474 (7th Cir. 1980), *cert. denied*, 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981).

Conclusion

Under the 2(b) provision of the McCarran-Ferguson Act, it is one thing to enjoy antitrust immunity for fixing prices under a permissive or unenforced state regulatory system. However, it is clearly another concern for a group to enter into an agreement to force a competitor out of business if he fails to adhere to an illegal agreement. The boycott provision under section 3(b) of the McCarran-Ferguson Act permits the former agreement, but not the latter. Our result here is consistent with the overall policy of the antitrust laws: to promote competition. Justice Brandeis, discussing a labor agreement to boycott, once observed: "The right to carry on business — be it called liberty or property — has value. To interfere with this right without just cause is unlawful." *Dorchy v. Kansas,* 272 U.S. 306, 311, 47 S.Ct. 86, 87, 71 L.Ed. 248 (1926). His concern is applicable here.

We conclude that the district court erred in granting summary judgment for the defendant workers' compensation insurance carriers and WCIRAM. We find more than sufficient evidence and the available inferences therefrom to create a question of fact concerning the defendants' motive and intent to boycott, coerce or intimidate insurers in adhering to a fixed rate under threat of expulsion from membership in WCIRAM.[33] There is overwhelming evidence that such a boycott was agreed upon to thwart the competitive pricing policy approved by the Minnesota legislature in 1979. Accordingly, we vacate that portion of the district court's judgment which finds that no evidence exists of an agreement by the defendants to boycott, coerce or intimidate other insurers under McCarran-Ferguson Act section 3.

Since federal jurisdiction is predicated upon the Sherman Act, the district court should in the interest of judicial economy also accept pendent jurisdiction of the plaintiffs' state law claims. We also reverse and vacate that portion of the judgment which denied pendent state court claims for further consideration by the trial court.

We therefore affirm the district court's judgment that defendants have shown sufficient state regulation of the business of insurance to invoke immunity from liability for Sherman Act violations under McCarran-Ferguson Act section 2(b). However, we vacate that portion of the defendants' dismissal under section 3(b) of the McCarran-Ferguson Act. We hold that plaintiffs have produced sufficient evidence of an agreement to boycott, coerce or intimidate to trigger an exception to section 2(b) immunity. We also reverse the dismissal of plaintiffs' pendent state court claim.

IT IS SO ORDERED.

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33. *See supra* n.19.

BEAM, Circuit Judge, concurring.

I concur with the result reached by the majority, finding that the district court erred in granting summary judgment in favor of defendants in reliance upon the McCarran-Ferguson Act, but do so for reasons different from those expressed in the majority opinion. In my view, the alleged acts of price fixing mentioned in the complaint were not "regulated by state law" as envisioned by McCarran-Ferguson. The Act does not, therefore, bar plaintiffs' statutory claims.

The McCarran-Ferguson Act is designed primarily to preserve state regulation and taxation of the business of insurance. 15 U.S C. § 1011. The Act exempts the business of insurance from the operation of any federal law which operates to "invalidate, impair, or supersede" state insurance regulation. 15 U.S.C. § 1012(b). However, the Act also provides that the Sherman Act and the Clayton Act "shall be applicable to the business of insurance to the extent such business is not regulated by state law." *Id.* Further, regardless of the existence of state regulation, the Sherman Act applies to any agreement between insurers to "boycott, coerce, or intimidate, or [any] act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). This statutory framework establishes three requirements which must all be met to obtain the exemption from anti-trust liability. Conduct which is 1) part of the business of insurance; 2) regulated by state law; and 3) not in the form of coercion, intimidation, or boycott, is removed from antitrust scrutiny under the Act. *Health Care Equalization Committee v. Iowa Medical Soc'y*, 851 F.2d 1020, 1028 (8th Cir. 1988). *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 124, 102 S.Ct. 3002, 3006, 73 L.Ed.2d 647 (1982). My concern in this case is with the application of the second requirement.[1]

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1. In applying this statute to the case at hand, it should be remembered that exemptions from the antitrust laws are to be narrowly construed, and that the burden of establishing the applicability of such an exemption is

Defendants allege that the State of Minnesota enacted a generally comprehensive regulatory scheme which encompassed the setting of workers' compensation insurance rates, and that such a general regulatory scheme is sufficient to meet the requirement of state regulation under McCarran-Ferguson. The district court agreed, and found that the challenged conduct was regulated as required by McCarran-Ferguson. In so holding, the court relied on two decisions it deemed controlling, *Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and *Lawyers Title Co. v. St. Paul Title Ins. Co.*, 526 F.2d 795 (8th Cir. 1975). I believe these cases support the conclusion that the facts here do not satisfy the state regulation requirement.

In *National Casualty*, the plaintiffs sought to set aside certain cease-and-desist orders issued by the Federal Trade Commission which prohibited alleged false and misleading advertising practices. Plaintiffs alleged that McCarran-Ferguson prohibited such interference because unfair and deceptive advertising practices were a part of the business of insurance which was regulated by state law. The Supreme Court agreed, deciding that the states in question had "regulated" the practices at issue. The Court said that each state had enacted "prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision." *Id.* at 564, 78 S.Ct. at 1262. While the Court did speak in terms of a generally comprehensive regulatory scheme, the regulations involved in the case dealt specifically and in detail with the practices at issue in the lawsuit. There was more than simply a regulatory presence in the industry—there were specific directives which prohibited the challenged conduct. *National Casualty* does not, as the district court and the majority suggest, infer that regulation

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upon the party asserting it. *See Pireno*, 458 U.S. at 126, 102 S.Ct. at 3007; *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 732 (8th Cir. 1977).

which only inferentially affects a challenged practice is sufficient to satisfy the McCarran-Ferguson requirement.

In *Lawyers Title,* plaintiffs set forth allegations of predatory pricing activities against the defendant title insurance company. At issue was whether Missouri statutes "regulated" pricing practices within the title insurance industry. The court said that Missouri did so regulate the practice, noting "if the state statute generally regulates the pricing schedules and conduct of insurance companies, this suffices to exempt the insurance carriers so regulated from federal antitrust suits." *Id.* at 797 (citations omitted). While the court spoke in terms of a "general" regulatory presence, as in *National Casualty,* the court also determined that the specific regulation at issue addressed the very practices involved in the lawsuit. Both of these cases, I believe, focused narrowly upon the existence of regulation of the specific conduct at issue in the lawsuit, not upon a general state regulatory presence in the insurance industry. *See United States v. Crocker Nat'l Corp.*, 656 F.2d 428, 453 n.85 (9th Cir. 1981) (referring to *Lawyers Title* as representative of cases where the court "focused on whether the state regulated the specific conduct alleged to be in violation of the federal antitrust laws"), *rev'd on other rounds sub. nom. Bankamerica Corp. v. United States,* 462 U.S 122, 103 S.Ct. 2266, 76 L.Ed.2d 456 (1983); *Crawford v. American Title Ins. Co.,* 518 F.2d 217 app., 218 (5th Cir. 1975) (McCarran-Ferguson renders antitrust law inapplicable when state "generally proscribes, permits or otherwise regulates the conduct in question"). *Cf. Feinstein v. Nettleship Co.,* 714 F.2d 928, 932 (9th Cir. 1983), *cert. denied,* 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau*, 701 F.2d 1276, 1287 n.10 (9th Cir.) (distinguishing *Crocker National*, the court found it was enough that a detailed overall scheme of regulation existed), *cert. denied,* 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

In light of this standard, I believe the facts of this case compel a conclusion that the State of Minnesota did not "regulate" workers compensation insurance pricing practices

within the meaning of McCarran-Ferguson. Prior to 1979, Minnesota required all workers' compensation insurers to charge rates promulgated by the state rating bureau. In 1979, however, the state amended its statutes to provide for only a maximum rate—insurers were expressly permitted to charge rates below the maximum. *See* Minn. Stat. § 79.21 (1982). The undisputed purpose of this amendment was to deregulate the pricing of workers' compensation insurance and encourage competition among insurers at rates below the maximum. While other general pricing regulations were left in place, the matter of setting premiums to be charged was intentionally left to the discretion of insurers. *See* Addendum of State of Minnesota as Amicus Curiae at 31-32 (Affidavit of Michael Hatch, Commissioner of the Minnesota Department of Commerce).

Given Minnesota's intentional deregulation of workers' compensation rates, I would find that Minnesota does not "regulate" these rates for purposes of application of McCarran-Ferguson. While the state did maintain a general regulatory presence in the field, there was no specific regulation targeted at the alleged practices at issue in this lawsuit—price-fixing below the maximum allowable rate. To hold otherwise reaches a truly ironic result. If the amended statutory scheme is deemed to constitute "regulation" under McCarran-Ferguson, then the very statute intended to deregulate rates and encourage price competition would work to displace the obligation to compete imposed by federal antitrust laws. Such a result certainly was not intended by those who implemented the amended statute, nor is such a result consistent with the purpose of McCarran-Ferguson. Under the unusual facts presented here, neither Minnesota's more general workers' compensation regulations, nor, as defendants also suggest, Minnesota's version of the Model Unfair Trade Practices in Insurance Act, sufficiently regulate acts of workers' compensation rate price fixing to satisfy the "state regulation" requirement of McCarran-Ferguson.

I would reverse the district court and find the McCarran-Ferguson Act inapplicable to plaintiffs' price-fixing claims because the practice is not "regulated" by the State of Minnnesota as required by the Act.[2]

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2. Given this conclusion, I would not reach the third requirement necessary for the McCarran-Ferguson exemption, that the conduct was not in the form of coercion, intimidation or boycott.

In re WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION.

Civ. No. 3-83-497.

United States District Court
District of Minnesota
Third Division

Nov. 2, 1983

MEMORANDUM ORDER

MAGNUSON, District Judge.

This matter is before this court on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). A hearing was held before the Honorable Paul A. Magnuson on Friday, September 23, 1983. Vance Opperman, Esq., Richard Braman, Esq., Will Mahler, Esq., Andrew MacIntosh, Esq., John Bonner, Jr., Esq., and K. Craig Wildfang, Esq., appeared on behalf of plaintiffs. James Loken, Esq., and Francis Barron, Esq., appeared on behalf of defendant Home Insurance Company; William F. Conlon, Esq., appeared on behalf of defendant Aetna Casualty & Surety. William Hannay, Esq., and William Montgomery, Esq., appeared on behalf of defendant Twin City Fire Insurance. Peter Hendrixson, Esq., appeared on behalf of defendant Travelers Insurance. Leon Goodrich, Esq., appeared on behalf of defendant St. Paul Fire & Marine Insurance Company. Thomas E. Harms, Esq., appeared on behalf of the remaining defendants.

On May 3, 1983, this court consolidated three similar antitrust actions for pretrial purposes. Each of these actions include substantially the same allegations. Plaintiffs are employers with businesses in the State of Minnesota who are required, under Minnesota law, to carry workers' compensation insurance or to qualify as "self-insured". The defendants are insurance companies, providing workers' compensation insurance to Minnesota employers, and the Workers' Compensation Insurers' Rating Association of Minnesota

("WCIRA"). The WCIRA is organized pursuant to Minn. Stat. § 79.11 (1982) and all of the defendants are required to be members. The essence of the plaintiffs' complaint is that the defendants have engaged in unauthorized price fixing in violation of the antitrust laws. On June 6, 1983, defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). Discovery and class certification proceedings were stayed on June 9, 1983, pending the outcome of the present motion. The basis of the defendants' motion is that the McCarran Act exempts the conduct alleged in the plaintiffs' Complaint from the federal antitrust laws.

In *Bennett v. Berg*, 685 F.2d 1053 (8th Cir.1982), the Eighth Circuit Court of Appeals outlined the test to be applied to Rule 12(b)(6) motions:

> A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." [citations omitted].

Id. at 1057-58. Thus, for purposes of the present motion, the court will assume that the defendants engaged in price fixing.

BACKGROUND

In *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1869), the United States Supreme Court held that insurance contracts were not transactions in interstate commerce and could not be regulated by Congress. As a result of the *Paul* decision, the regulation of insurance companies was left to the states. In the 75 years following *Paul*, nearly every state adopted an extensive body of regulations governing the insurance industry. The validity of these regulations was

never threatened until 1944 when the Supreme Court handed down its decision in *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

In *South-Eastern* the United States indicted the South-Eastern Underwriters Association and several insurance companies for conspiracy to restrain trade by fixing prices. The defendants argued that they could not be indicted under the antitrust laws since they were not engaged in interstate commerce. The district court agreed. The United States Supreme Court reversed holding that insurance was part of interstate commerce. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 553, 64 S.Ct. 1162, 1173, 88 L.Ed. 1440 (1944). The *South-Eastern* decision had several far reaching implications. First, the Supreme Court's holding, that insurance contracts were a part of interstate commerce, threatened the validity of the regulatory schemes painfully established by the states for more than three-quarters of a century. More importantly, from the standpoint of the insurance industry, the decision left the insurance industry open to widespread antitrust liability. For years the states had permitted, and in some cases required, insurance companies to engage in conduct which violated the Sherman Act.

Though the "state action" doctrine, enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), protected insurance companies from state-mandated violations of the antitrust laws, that doctrine was extremely narrow and did not cover many of the activities previously engaged in by insurance companies.

In response to the *South-Eastern* decision, Congress enacted the McCarran Act.[1] Congress was persuaded that the continued regulation of the insurance industry was in the

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1. For a more poetic version of the history of the McCarran Act, *see* Mertz, *The First Twenty Years—A Case-Law Commentary on Insurance Regulation Under the Commerce Clause*, 1964 A.B.A. Section of Ins., Negligence & Compensation L. 153 (quoting remarks of H. McCallion at a

public interest and that the effective underwriting of risks required cooperation among insurance companies. 15 U.S.C. § 1011.[2] 15 U.S.C. § 1012(a) is the substantive provision providing for the continued regulation and taxation of the

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symposium on insurance and antitrust law, New York, 1963) where the author states:

> In an "old testament" not related to mosaic law we may read of a compatible couple called Paul and Virginia, who are somewhat incompatibly referred to in prosaic law as Paul against Virginia. And it is there written that Paul and Virginia lived in a wonderful Garden in which it was the law of the land that insurance *was not* commerce. There they dwelled for 75 years, calmly contemplating each other's virtues, unmindful of the rude competitive world beyond their Garden. Then in a "new testament" we may learn of a new association, rather unromantically called "South-Eastern Underwriters" which intruded upon the Garden of Paul and Virginia and drove them hence into the outer world where it was the law of the land that insurance *was* commerce and when it crossed state lines was interstate commerce.
>
> At once, the insurance children of Paul and Virginia became heir to the limitations and ills of the Flesh that had long plagued others who had not been so fortunate as to dwell in the Garden. We may read in detail what these limitations are in the Books of Sherman, Clayton, and Federal Trade Commission. . . .
>
> But there were many in the land of US who thought that the punishment so suddenly vented upon the insurance children of Paul and Virginia was much too severe. It was not merely that each of them had to turn over a new leaf. It was rather that, having lived in their innocence in the Garden for so long a period, they were ill prepared for this newly regulated mode of living and, moreover, they were truly different from the other inhabitants in form and in spirit.
>
> In order to ascertain what was done to loosen the bonds to which they became subject, we must turn now to the words found in the Act of McCarran . . . .

2. As one commentator has observed, there are several overriding goals behind the regulation of the insurance industry; insurer solvency and reasonable rates. Enforcement of the antitrust laws would further the goal of fair, reasonable and efficient rates. However, to some extent, competition would hinder the goal of maintaining insurer solvency. The McCarran Act allows states to further the goal of insurer solvency by setting the rates for insurance premiums. The McCarran Act also represents a policy decision that the states should be free to regulate but that if the states refuse to

business of insurance by the states.[3] 15 U.S.C. § 1013(a) provided for the limited suspension of the anti-trust laws until 1948. Those sections of the McCarran Act dealing with the anti-trust immunity of insurance companies are codified in 15 U.S.C. §§ 1012(b) and 1013(b).

15 U.S.C. § 1012(b) states:

> No act of Congress shall be construed to *invalidate, impair, or supersede* any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance:* Provided, that after June 30, 1948 [the Sherman Act, Clayton Act, and the FTC Act] shall be applicable to the *business of insurance* to the extent that such business is *not regulated* by State law.

Id. (emphasis supplied).[4] Congress went on to provide in § 1013(b) that nothing in the McCarran Act should be con-

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regulate, the insurance industry should be competitive. Carlson, *The Insurance Exemption From the Antitrust Laws,* 57 Tex.L.Rev. 1127, 1139 (1979).

3. The McCarran Act was upheld in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). In *Prudential* the Supreme Court upheld, against a commerce clause attack, a state statute that taxed foreign insurers at 3% of the premiums from business within the state but imposed no tax on domestic insurers. It seems quite likely that the statute at issue in *Prudential* would have been unconstitutional absent the McCarran Act. As a result of *Prudential*, Congress can delegate its commerce clause powers to the states and permit the states to exercise that power in a manner that, absent the delegation, would be a violation of the commerce clause. The Supreme Court correctly interpreted the congressional policy behind the McCarran Act by stating that Congress "clearly put the full weight of its power behind existing and future legislation to sustain it from any attack under the commerce clause . . . ." *Id.* at 431, 66 S.Ct. at 1155. For an excellent history of the McCarran Act *see* M.C. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L.J. 587.

4. It is clear that 15 U.S.C. § 1012(b) contains two distinct clauses. The plaintiffs argue that the first clause applies and that this court should

strued to render the Sherman Act inapplicable to an agreement to boycott, coerce or intimidate. Thus, it is well settled that in order for an insurance company to qualify for the McCarran Act exemption it must show that the activities are the *"business of insurance"*; are *"regulated by state law"*; and do not constitute a *"boycott"*.

As a prelude to determining whether the conduct in question constitutes the "business of insurance" it is necessary to understand Minnesota's statutory scheme for establishing workers' compensation rates. Prior to 1979, workers' compensation premiums were set by an administrative process involving a ratemaking bureau and the Commissioner of Insurance. Insurance companies were required by law to provide workers compensation coverage to Minnesota employers. The ratemaking bureau, which consisted of insurance companies providing workers' compensation coverage, compiled actuarial and statistical information on various underwriting risks. The bureau established a price for each risk which was subject to approval by the Commissioner. Once the Commissioner established a price the insurance companies were required to provide insurance at that price. The plaintiffs agree that if the conduct in question had occurred prior to 1979 the defendants would not be subject to any antitrust liability.[5]

In 1979, Minnesota amended its workers' compensation statute. The amendments included a similar ratemaking procedure whereby the rating bureau recommended rates to the

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apply the antitrust laws because they do not "invalidate, impair, or supersede" a state law. The defendants argue that only the proviso of § 1012(b) applies to the present case. The two sections of § 1012(b) apply in different situations. The first sentence is intended to make state law supreme in any conflict with federal law unless Congress clearly expresses its intent to cover the insurance industry with a particular statute. The proviso deals specifically with the application of the antitrust laws.

5. The plaintiffs do not concede that if the present conduct had occurred prior to 1979 it would have been protected by the McCarran Act. Rather, they argue that the "state action" doctrine would have foreclosed antitrust liability.

Commissioner. The one significant change was that the rates set by the Commissioner were *maximum* rates and the insurance companies were expressly permitted to charge lower rates.[6] Minn. Stat. § 79.21 (1982). It is clear that the purpose behind the amendment to Minn. Stat. § 79.21 was to permit competition in setting workers' compensation premiums, subject only to the ceiling established by the Commissioner.

The plaintiffs allege that after 1979 the insurance companies entered into a private agreement to fix the price of workers' compensation premiums at the maximum price established by the Commissioner of Insurance. In so doing, plaintiffs allege that the defendants not only defeated the intent of Minn. Stat. § 79.21 but violated the antitrust laws in the process. The plaintiffs do not challenge the ratemaking process established by the State of Minnesota. Rather, they claim that after the ratemaking process was over and the maximum price was set by the Commissioner the defendants entered into a private, unregulated, side agreement to maintain premiums at the maximum rate permitted by law.

BUSINESS OF INSURANCE

Plaintiffs and defendants agree that the Supreme Court's recent decisions in *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982) and *Group Health & Life Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979) established the test for whether certain activity constitutes the "business of insurance." The *Pireno* Court enunciated

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6. Minnesota's decision to permit competition in the setting of premiums is part of a national trend favoring deregulation. *See* L. Sullivan and J. Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*. 27 UCLA L.Rev. 265, 272 (1979). As of 1979, sixteen states, led by California, adopted legislation giving individual companies freedom to set their own prices. *Id.* Moreover, a recent Justice Department study concluded that restricted price competition would be an effective alternative to state regulation of property and liability insurance. Dennis *The Justice Department Study—An Update*, 13 Forum 920, 922-23 (1978).

three criteria for determining whether conduct constitutes the "business of insurance" within the meaning of the McCarran Act.

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. 102 S.Ct. at 3009 (*citing Royal Drug*). *Royal Drug* involved an agreement between Blue Shield and various pharmacies in which Blue Shield agreed to fully reimburse pharmacies participating in the agreement and to only partially reimburse non-participating pharmacies. In *Pireno,* the Union Labor Life Insurance Company used a "peer review" system for evaluating whether chiropractors' charges were "reasonable" or "necessary medical care services". In both *Pireno* and *Royal Drug* the Court analyzed the challenged conduct under the criteria set out above and concluded that it did not constitute the "business of insurance".

The problem with both *Pireno* and *Royal Drug* is that the Court formulated the three step analysis for purposes of determining whether ancillary activities carried on by insurance companies constituted the "business of insurance". Neither Court squarely addressed the issue of whether blatant price fixing constitutes the "business of insurance". Minnesota's statutory scheme for fixing the maximum price for workers' compensation premiums is certainly part of the "business of insurance". The United States Supreme Court recognized this in *SEC v. National Securities*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969) when it said "[c]ertainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about". *Id.* The defendants contend that the entire ratemaking process including, for purposes of this motion, the private price fixing agreement is part of the "business of insurance". The plaintiffs concede that Minnesota's statutory scheme for estab-

lishing the maximum price is part of the "business of insurance" but argue that the defendants' private price fixing conspiracy is not a part of the "business of insurance". The issue before this court is whether price fixing becomes something other than the "business of insurance" because it is done illegally.

The plaintiffs' view of the McCarran Act is somewhat akin to an inverse pre-emption analysis. They argue that when the Minnesota Legislature amended Minn. Stat. § 79.21 to provide for competition it removed price fixing from the definition of the "business of insurance". If Minnesota were suddenly to move back into the field and set the price for workers' compensation premiums the state law would "pre-empt" the Sherman Act; price fixing would be protected by the McCarran Act and would once again be part of the "business of insurance". What the plaintiffs are really saying is that price fixing is not the "business of insurance" because it is not regulated by the states. If it was regulated by the states (i.e., pre-1979) it would be part of the "business of insurance".

There are several flaws in the plaintiffs' argument. The plaintiffs' argument collapses the first two of the three steps in a McCarran Act exemption analysis.[7] Instead of first asking whether a discreet activity constitutes the business of insurance and then asking if that activity is regulated by state

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7. There is some support for the proposition that the first two elements of the McCarran Act test should be unified. The first argument is based upon the language of the McCarran Act itself which states that the antitrust laws shall be applicable to the business of insurance "to the extent that such business is not regulated by State law". 15 U.S.C. § 1012. The second argument is based on a reading of congressional intent. As one commentator put it:

> A more satisfactory approach would be to develop a "business of insurance" test explicitly aimed at limiting McCarran's scope to insurance company activities that can rationally be claimed to need anticompetitive regulation, such as the cooperative data gathering or risk posing arrangements mentioned earlier. Specific state regulatory efforts would then guide the Federal Courts in identifying exempt

law, the plaintiffs urge upon this court a circular argument: the activity is the business of insurance *only if* it is regulated by state law. Though this argument has some appeal the recent Supreme Court cases which have considered the McCarran Act exemption have all concluded that the statute requires a court to determine whether the activity is the business of insurance before determining whether that activity is regulated by state law or is a boycott.

The position that each of these inquiries is distinct is supported by the Supreme Court's recent decision in *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). In *Royal Drug* the Supreme Court rejected a functional policy-based analysis of whether conduct constituted the "business of insurance" in favor of a more technical approach. The Court cited such standard

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"business of insurance" activities. This approach would be consistent with McCarran's purpose of allowing states the authority to control the insurance business in the ways they think best.

Some may object that such an approach confuses the three heretofore distinct McCarran tests. The proposed test would indeed establish common ground between the "business of insurance" and the "regulated by state law" elements of the Act's tests. It would also bring both of these elements into congruence with the proposed mode of interpreting the "boycott, coercion, or intimidation" exception. . . . Perhaps the Court is en route to such an interpretation of the "business of insurance" test, but until it again speaks on the topic, these observations must remain speculative.

L. Sullivan & J. Wiley, *Recent Antitrust Developments: Defining the Scope of Exceptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. Rev. 265, 285 (1979). By collapsing the "business of insurance" and "state regulation" elements, the test becomes essentially whether the legislature intended to permit certain conduct. If it did, the antitrust laws would not apply. If the legislature did not intend to permit certain anticompetitive conduct the antitrust laws would be the enforcement mechanism to carry out the legislature's will. At a time when more and more states are deregulating the insurance industry in the hopes that increased competition will result in lower prices to policyholders it may well be that such an interpretation of the McCarran Act would best carry out public policy. However, it is clear from *Royal Drug, Pireno* and *St. Paul* that a proper McCarran Act exemption analysis requires three analytically distinct steps.

works as Couch, Keeton, and Webster's Dictionary in defining the term "insurance". *Id.* at 211, 99 S.Ct. at 1073. It is clear from the Supreme Court's analysis in *Royal Drug* that the determination of whether a particular activity constitutes the "business of insurance" is not dependent upon whether that activity is regulated by state law. The plaintiffs agree that the ratemaking procedure, established pursuant to the Minnesota statutory scheme, is part of the "business of insurance." Ever since the McCarran Act was passed states have enacted regulations governing ratemaking. The plaintiffs' argument can be reduced to the simple proposition that ratemaking is not part of the "business of insurance" if it is illegal. The Supreme Court has squarely rejected this proposition. *Id.* at 210 n.5, 99 S.Ct. at 1072 n.5 ("It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal.") Ratemaking is inherently part of the "business of insurance" and it is no less so simply because it may be illegal.[8]

STATE REGULATION

Having determined that the activity in question is part of the "business of insurance", the court must next decide whether ratemaking is "regulated by the state" within the meaning of the McCarran Act. The state regulation requirement has given rise to two schools of thought. Plaintiffs support the view that in determining whether a state regulates the business of insurance the court must first look to see if the state has adopted statutes or regulations governing the *particular conduct at issue.* The defendants support the view that a general scheme of regulation is sufficient to satisfy the state regulation requirement.

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8. As the Supreme Court stated in *Royal Drug:* One question not resolved by [the] legislative history is which of the various practices alleged in the *South-Eastern Underwriters* indictment Congress intended to be covered by the phrase "business of insurance." The indictment in that case had charged, for example, that the defendants had fixed their agents' commissions as well as premium rates. It is clear from the legislative history that the fixing of rates is the "business of insurance."

The leading Supreme Court case on the state regulation requirement of the McCarran Act is *Federal Trade Commission v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958). In *National Casualty* the Federal Trade Commission, pursuant to 15 U.S.C. § 45, ordered several insurance companies to stop deceptive advertising. The insurance companies argued on appeal that the McCarran Act prohibited the FTC from regulating the advertising of insurance companies since that conduct was already regulated by states that had adopted the "Model Unfair Trade Practices Bill for Insurance". *Id.* at 564, 78 S.Ct. at 1262. The Supreme Court agreed holding that the state regulation was sufficient to invoke the McCarran Act. *Id.* at 565, 78 S.Ct. at 1262.

The Supreme Court also expressly rejected the FTC's argument that the state regulation was not effective enough to invoke the McCarran Act saying:

> [The FTC] urges that a general prohibition designed to guarantee certain standards of conduct is too "inchoate" to be "regulation" until that prohibition has been crystallized into "administrative elaboration of these standards and application in individual cases." However, assuming there is some difference in the McCarran-Ferguson Act between "legislation" and "regulation", nothing in the language of that Act or its legislative history supports the distinction drawn by the petitioner.

Id. The Court in *National Casualty* indicated that it was unnecessary to inquire into the effectiveness of a particular regulation.

Plaintiffs also argue that since "the challenged conduct is *not* the 'business of insurance', the conclusion inevitably follows that it is not the business of insurance regulated by state law". *Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at page 16.* In light of this court's conclusion that the present activity is part of the "business of insurance", plaintiffs' position is untenable.

The plaintiffs' final argument that the challenged conduct is not regulated by state law is that the 1979 amendments to the workers' compensation statute, permitting competition, expressly withdrew state regulation. This is the plaintiffs' version of the argument that says in determining whether activity is regulated by state law a court must look specifically at the challenged conduct. They claim that the specific activity in question is no longer regulated by the state and the antitrust laws should therefore apply. If this reasoning is extended the exemption would not apply unless the state regulation prohibited all activity which, absent the McCarran Act, would violate the antitrust laws. This argument was addressed and squarely rejected in *Dexter v. Equitable Life Assurance Society of U.S.*, 527 F.2d 233 (2d Cir. 1975). *Dexter* involved a tying arrangement between life insurance and mortgage loans. In addressing the state regulation argument, the court stated:

> Plaintiffs' second argument, as we understand it, is that because tying arrangements of this sort were not specifically prohibited by Connecticut law at the time of the challenged transactions, those transactions were not "regulated by State law" and the antitrust laws apply under the proviso of section 1012(b), quoted in note 2 supra. But this argument misunderstands the nature of the state regulation contemplated by the statute. State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit. The McCarran-Ferguson Act clearly contemplates that where a state undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws; if the exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate the antitrust laws, the state regulation which the McCarran-Ferguson Act aims to foster, 15 U.S.C. §§ 1011, 1012(a), would be a nullity.

Id. at 236. The *Dexter* Court went on to hold that Connecticut law regulated tying arrangements because the Commissioner of Insurance was given authority to order the discontinuance of unfair, illegal or improper practices. *Id.*

In *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir.1971) the Sixth Circuit had occasion to consider the scope of regulation needed to invoke the McCarran Act. In *Ohio AFL-CIO* the UAW brought suit against the Insurance Rating Board alleging price fixing in violation of the Sherman Act. The Sixth Circuit noted the conflict over the extent of regulation necessary to invoke the McCarran Act and then concluded that:

> The controlling test is ... whether the state has "generally authorized or permitted certain standards of conduct".

Id. at 1182. The Eighth Circuit Court of Appeals adopted the approach taken by the Sixth Circuit in *Ohio AFL-CIO. Lawyers Title Co. v. St. Paul Title Insurance Corp.*, 526 F.2d 795 (8th Cir. 1975). In *Lawyers Title* the Eighth Circuit stated:

> The Sixth Circuit has held "[I]f a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act." *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178, 1181 (6th Cir.1971), *cert. denied*, 409 U.S. 917 [93 S.Ct. 215, 34 L.Ed.2d 180] (1972). We agree, and hold that if the state statute generally regulates the pricing schedules and conduct of the insurance companies, this suffices to exempt the insurance carriers so regulated from federal antitrust suits.

Id. at 797. This court need only determine whether Minnesota has a general scheme for regulating insurance. Minnesota has done more than provide a general scheme of regulation; it has a comprehensive statute and a body of regulations which govern almost every aspect of the workers'

compensation scheme. Minn. Stat. § 72A.17 (1982) states that:

> The purpose of sections 72A.17 to 72A.32 is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Id. § 72A.17 indicates that the Minnesota Legislature intended to occupy the field by defining and prohibiting any activity it considered unfair or deceptive. In addition, Chapter 79 gives the Commissioner of Insurance broad powers over the activities of individual insurance companies and the rating association. Thus, for purposes of the McCarran Act, the State of Minnesota regulates the business of insurance.

BOYCOTT

Even if the activity in question is found to be the "business of insurance" and is regulated by state law, the Sherman Act will still apply to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation". 15 U.S.C. § 1013(b). Until recently it was generally thought that the "boycott" exception to the antitrust exemption did not apply to disputes between an insurer and the insured.[9] However, in *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978) the United States

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9. *See Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (2d Cir. 1974) *cert. denied.* 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975) (Dismissing policyholder complaint that tied life insurance to home loans on the ground that plaintiff was not a member of the class of persons to be protected by "boycott" provision of the McCarran Act. *See also*, Hamric, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, 29 Vanderbilt L. Rev. 1271 (1976) where the author states that "Policyholders rarely if ever succeed in suits under 3(b)." *Id.* at 1279.

Supreme Court squarely held that an agreement among insurance companies not to deal with policyholders, in order to coerce submission to another company's coverage terms, constituted a boycott.

In *St. Paul* a group of Rhode Island doctors sued the only four insurance companies offering medical malpractice insurance, in the state, on the ground that three of them had refused to sell malpractice insurance in order to force compliance with St. Paul's restrictive malpractice coverage.[10] The problem remaining after *St. Paul* is to define the scope of the term "boycott" for *McCarran Act purposes*.[11]

The defendants argue strenuously that any interpretation of "boycott" requiring anything less than an absolute refusal to deal, on any terms, would expand the boycott exception to the point of swallowing the McCarran Act exemption, since any agreement to fix prices can be seen as an agreement to *refuse to deal except on an agreed upon price*.[12] The defendants go on to argue that since the plaintiffs were required by law to purchase workers' compensation insurance from the defendants there was no "absolute refusal to deal."

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10. The *St. Paul* court did not consider whether the challenged conduct constituted the "business of insurance" or was "regulated by state law." Both of these issues were conceded.

11. At oral argument in the present case both parties spent a significant amount of time arguing over the meaning of the term "boycott". Part of the confusion stems from the question of whether "boycott" has the same meaning in antitrust law as it does for purposes of the McCarran Act. Though the issue has never been squarely decided, Justice Powell didn't think so in *St. Paul* when he stated the issue as "whether the conduct in question involves a boycott, not whether it is per se unreasonable". *St. Paul*, 438 U.S. at 542, 98 S.Ct. at 2930.

12. One definition of the term "boycott" noted with approval in *St. Paul* was a

> method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the Target.

438 U.S. 531, 533, 541, 98 S.Ct. 2923, 2925, 2929, 57 L.Ed.2d 932 (1978).

The defendants' argument is that as long as the Minnesota statute forces them to deal with the plaintiffs, as a matter of law there can be no boycott within the meaning of the McCarran Act.

The plaintiffs argue that there is no difference between a concerted refusal to deal *except upon specified terms* and an *absolute* refusal to deal. Ordinary price fixing can be viewed as a refusal to deal except at a specified price. Under this view the term "absolute refusal to deal" means that one party refuses to engage in economic relations with another for the purpose of forcing the other party to agree to certain terms and conditions. In the *St. Paul* case itself three insurance companies refused to deal with the customers of St. Paul Fire & Marine Insurance Company in order to force those customers into accepting medical practice insurance *on the terms specified by St. Paul. St. Paul Fire & Marine Insurance Company v. Barry*, 438 U.S. 531, 533, 535, 98 S.Ct. 2923, 2925, 2926, 57 L.Ed.2d 932 (1978). The court in *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 179 F.Supp. 65 (N.D. Cal. 1959), in considering the distinction between an absolute refusal to deal and a refusal to deal except upon specified terms stated expressly that "[t]he distinction is without substance." *Id.* at 66. Moreover, Justice Stewart alluded to the same problem in *St. Paul* when he said:

> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (i.e. a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (i.e. coercion).

St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 559 n.6, 98 S.Ct. 2923, 2939 n.6, 57 L.Ed.2d 932 (Stewart, J., dissenting). Thus there is substantial support for the plaintiffs' proposition that there is no logical distinction between price fixing and an absolute refusal to deal.

Though plaintiffs' argument is persuasive, a closer reading of the *St. Paul* decision convinces this court that for purposes of the McCarran Act there is a difference between an absolute refusal to deal and price fixing and the latter does not constitute a boycott under the McCarran Act. The only dissenting opinion in *St. Paul* was authored by Justice Stewart. The basis for the dissent was the fear that the majority had expanded the definition of "boycott" under the McCarran Act, to the point where it swallowed the Antitrust exemption. As Justice Stewart stated:

> The broad reading the Court gives to § 3(b) seems to me not only to misconceive the larger design of the Act but also to distort its basic purpose. Section 3(b) is an absolute exemption to § 2(b). It brings back under the Sherman Act a range of practices, whether authorized by state law or not. By construing § 3(b) very expansively, the Court narrows the field of regulation open to the States. Yet it was clearly Congress' intent to give the States generous license to govern the business of insurance free of interference from the antitrust laws.... ... if "boycott" is to be given the same scope it has in Sherman Act case law, then so should "coercion" and "intimidation." But that reading of § 3(b) would plainly devour the broad antitrust immunity bestowed by § 2(b). Congress could not logically have intended that result.

Id. at 558-559, 98 S.Ct. at 2938-39. It is clear that the dissenters in *St. Paul* feared that the majority's interpretation of boycott would encompass nearly every activity prohibited by the Sherman Act. *St. Paul*, 438 U.S. 531, 559 n.6, 98 S.Ct. 2923, 2939 n.6, 57 L.Ed.2d 932.

The majority opinion expressly dealt with Justice Stewart's concern stating:

> We note our disagreement with Mr. Justice STEWART's expression of alarm that a reading of the operative terms of § 3(b), consistent with traditional Sherman Act usage, "would plainly devour the broad

> antitrust immunity bestowed by § 2(b)." [Post at 559, 98 S.Ct. at 2938]. Whatever the precise reach of the terms "boycott," "coercion," and "intimidation," the decisions of this Court do not support the dissent suggestion that they are coextensive with the prohibitions of the Sherman Act. See *e.g., Eastern States Lumber Assn v. United States*, 234 U.S. 600, 611, 34 S.Ct. 951, 954, 58 L.Ed. 1490 (1914), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438, 31 S.Ct. 492, 496, 55 L.Ed. 797 (1911). In this regard, we are not cited to any decision illustrating the assertion, [post at 559 n.6, 98 S.Ct. at 2939 n.6], that price fixing, *in the absence of any additional enforcement activity*, has been treated either as a "boycott" or "coercion."

Id. at 545 n.18, 98 S.Ct. at 2932 n.18 (emphasis supplied). It is clear that both the majority and dissent in *St. Paul* wished to avoid any interpretation of the McCarran Act which would convert ordinary price fixing into a boycott thereby destroying the McCarran Act exemption.

After *St. Paul* there appears to be an undesignated point, on the line between "mere price fixing" and an absolute refusal to deal, where enforcement activity in support of a conspiracy to fix prices gives rise to a "boycott" for purposes of the McCarran Act exemption.[13] The plaintiffs allege in their complaint that the defendants conspired to *enforce* their price fixing agreement. This is a 12(b)(6) motion and the court must accept the truth of that allegation. Because some level of enforcement activity, in support of a price fixing conspiracy, will give rise to a "boycott" for purposes of the McCarran Act and because the plaintiffs have alleged enforcement activity, this court cannot say that, as a matter of law, the plaintiffs may not recover.

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13. Unless the price fixing conspiracy is merely an inchoate criminal offense there is almost always some enforcement activity in support of a price fixing conspiracy.

The court wishes to make clear that the denial of defendants' 12(b)(6) motion is based on the lack of any factual data concerning the enforcement activity in support of the price fixing conspiracy. This motion was structured as a motion to dismiss and no affidavits were presented to the court. It may well be that discovery will reveal the extent, if any, of enforcement activity in support of the alleged price fixing conspiracy. Nothing in this order precludes the defendants from bringing a motion for summary judgment pursuant to Rule 56 supported by affidavits at a later stage in these proceedings.

In summary, this court concludes that the price fixing conspiracy alleged in plaintiffs' Complaint is part of the "business of insurance" and various Minnesota statutes "regulate the business of insurance" for purposes of the McCarran Act. However, this court cannot conclude that, as a matter of law, the plaintiffs have failed to state a cause of action under the boycott exception. Accordingly,

IT IS ORDERED that:

1. Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

In re WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION.

Civil File No. 3-83-497.

United States District Court
District ofMinnesota
Third Division

December 16, 1983

MEMORANDUM ORDER

MAGNUSON, District Judge.

This matter is before this court on defendants' motion for reconsideration of an Order entered November 1, 1983.

On May 3, 1983, this court consolidated three similar antitrust actions for pretrial purposes. The plaintiffs are employers with businesses in the State of Minnesota who are required to carry workers' compensation insurance or to qualify as "self-insured". The defendants are insurance companies that sell workers' compensation insurance and the Workers' Compensation Insurers' Rating Association of Minnesota ("WCIRA"). The WCIRA is organized pursuant to Minn. Stat. § 79.11 and all the defendants are required to be members. The substance of the plaintiffs' complaint is that the defendants have engaged in unauthorized price fixing in violation of the antitrust laws.

On June 6, 1983, defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Discovery and class certification proceedings were stayed on June 9, 1983, pending the outcome of the motion to dismiss. The basis of the defendant's motion was that the McCarran Act provided an exception for the conduct alleged in the complaint. The parties briefed the issue and on September 23, 1983, the court heard oral arguments. Both parties also submitted written arguments following oral argument. On November 1, 1983, this court issued a memorandum order denying the

defendants' motion to dismiss. The basis of the court's decision was extremely narrow. The court concluded that because the plaintiffs had alleged enforcement activity in support of a price fixing conspiracy it could not conclude, as a matter of law, that the defendants' activity did not rise to the level of a boycott, thereby falling under the boycott exception to the McCarran Act exemption. On November 14, 1983, the defendants brought a motion for reconsideration which is now before the court. After reviewing the arguments of the parties, the court has found no reason to deviate from its prior decision. However, for reasons more fully explained below, the court concludes this case is appropriate for certification pursuant to 28 U.S.C. § 1292(b). 28 U.S.C. § 1292(b) states that:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order."

The general policy of our system of appellate review discourages piecemeal appeals both because such appeals impose additional burdens upon parties and involve appellate courts in deciding issues that are not necessary to a resolution of the underlying dispute. Section 1292(b) is a narrow exception to the final judgment rule. *Control Data Corp. v. International Business Mach. Corp.*, 421 F.2d 323 (8th Cir. 1970).

Unlike the exceptions to the final judgment rule contained in § 1291(a), Section 1292(b) addresses itself to promoting the value of institutional efficiency. *Forsyth v. Kleindiest*, 599 F.2d 1203, 1208 (3d Cir. 1979). There are three criteria which must be met before a district court may certify a non-appealable order under § 1292(b). The order must involve (1) a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and

(3) an immediate appeal must materially advance the ultimate termination of the litigation.

The first criteria—that the order involve a controlling question of law—is present in this case. In *Katz v. Carte Blanche Corporation*, 496 F.2d 747, 755 (3d Cir. 1974), the court elaborated on the "controlling question" standard stating

> A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal. If the statute were interpreted to exclude any such order that interpretation would be inconsistent with the clear intention of the sponsors to avoid a wasted trial.

Id. In the present case, this court ruled, on very narrow grounds, that the plaintiffs' complaint stated a cause of action. That certainly is an order which, if erroneous, will be reversible error on appeal after a trial on the merits.

The second requirement for certifying an order is that there be a substantial ground for difference of opinion. A substantial ground for difference of opinion does not exist in every case of first impression. 16 Wright & Miller, *Federal Practice and Procedure*, § 3930. However, this requirement is flexible enough so that the degree of doubt necessary to support a certification may fluctuate with the importance of the question. *Id.* In the present case, there is no controlling precedent in this or any other circuit. In fact, there is no case which even provides substantial guidance to this court. To put the matter bluntly, this court is not at all convinced that the approach it adopted will be the approach ultimately taken by the Eighth Circuit Court of Appeals.

The final requirement is that immediate review will materially advance the ultimate termination of the litigation. The purpose of this requirement has been stated as "minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court

proceedings". 16 Wright & Miller, *Federal Practice and Procedure*, § 3930.

The case before this court is very complex. The defendants include nearly every insurance company that sells workers' compensation insurance in the State of Minnesota. It is reasonable to assume that the cost of discovery and ultimately a trial on the merits will be substantial. All of the time and money invested in this case will be wasted if it is ultimately determined that this court's ruling was incorrect. Moreover, because of this court's trial calendar, it is highly unlikely that this case will be tried for at least three years. Thus, an immediate appeal certainly will not delay the ultimate termination of this action.

In summary, this court finds that the motion before it does involve a controlling question of law as to which there is a substantial ground for difference of opinion. The court further finds that an immediate appeal will advance the ultimate termination of this action.

For the reasons stated above, IT IS ORDERED that

1. Defendants' motion for reconsideration is denied.

2. Pursuant to § 1292(b), this order is certified for appeal.

3. All discovery is stayed until this court orders otherwise.

In re WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION.

Civil File No. 3-83-497.

United States District Court
District of Minnesota
Third Division

December 23, 1983

MEMORANDUM ORDER

ALSOP, District Judge.[1]

This matter is before this court on plaintiffs' motion for reconsideration of Orders entered November 1, 1983, and December 16, 1983. For purposes of this order, the court incorporates by reference its two previous orders entered in this case. This court's November 1, 1983 order denied defendants' 12(b)(6) motion. In so doing, the court found that:

(1) the challenged conduct is the "business of insurance" within the meaning of the McCarran Act. 15 U.S.C. § 1011 *et seq.*

(2) the challenged conduct is "regulated by state" law within the meaning of the McCarran Act.

(3) the challenged conduct is not, as a matter of law, outside the boycott exception to the McCarran Act exemption.

Because this court could not rule, as a matter of law, that the challenged conduct did not amount to a boycott under the McCarran Act, it denied defendants' motion.

The defendants then brought a motion for reconsideration, arguing that the challenged conduct did not fit within

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1. This order is being issued by Judge Donald B. Alsop at the specific request of Judge Paul A. Magnuson who is unavailable.

the boycott exception to the McCarran Act exemption. In the process of reconsidering its November 1, 1983 order, this court concluded that each of the three issues noted above was a controlling question of law as to which there was a substantial difference of opinion and that an immediate appeal would materially advance the ultimate termination of the litigation. Accordingly, on December 16, 1983, the court issued a Memorandum Order denying defendants' motion for reconsideration and certifying the order for appeal pursuant to 28 U.S.C. § 1292(b).

The plaintiffs have now brought a motion for clarification of this court's December 16, 1983 order. The plaintiffs seek to clarify whether this court intended to certify all three of the issues delineated above or to limit certification strictly to the boycott issue. This court has reviewed its December 16, 1983 order, and wishes to clarify any unintended ambiguity created by it. This court finds that each of the issues delineated in (1) through (3), *supra*, involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal will advance the ultimate termination of this action.

For the reasons stated above,

IT IS SO ORDERED that:

1. Plaintiffs' motion for clarification is granted.

2. Pursuant to 28 U.S.C. § 1292(b), this order is certified for appeal.

In re WORKERS' COMPENSATION INSURANCE ANTITRUST LITIGATION.

Civ. No. 4-85-1166.

United States District Court
District of Minnesota
Third Division

July 28, 1987

ORDER

ROSENBAUM, District Judge.

In this consolidated class action,[1] plaintiff employers allege that defendant insurers have violated state and federal antitrust laws in the sale of their workers' compensation insurance between June, 1979, and April, 1983. The Court has jurisdiction over plaintiffs' federal claims pursuant to 28 U.S.C. §1331 and §1337. The Court presently has pendent jurisdiction over plaintiffs' state claims.

This matter is currently before the Court on defendants' motion for summary judgment on Counts I-III (the federal antitrust claims) of plaintiffs' consolidated amended complaint. In connection with their summary judgment motion, defendants have moved the Court for an award of costs, disbursements, and attorneys' fees. In addition, plaintiffs and defendant Employers Insurance of Wausau, a Mutual Company (Wausau), have jointly moved the Court for preliminary approval of a proposed settlement agreement. Based upon the files, records, and proceedings herein, the Court grants defendants' motion for summary judgment, denies their motion for an award of costs, disbursements, and fees, and denies the joint motion of plaintiffs and Wausau for preliminary approval of their proposed settlement agreement.

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1. Although this case is filed as a class action, a class of plaintiffs has not, as yet, been certified.

I. Facts

The named plaintiffs[2] in this case are Minnesota employers within the meaning of Minnesota Statutes, §176.011, subdivision 10,[3] and as such are required by Minnesota Statutes, §176.181, subdivision 2, to carry workers' compensation insurance or to be self-insured. Defendants[4] include insurance companies which provide workers' compensation insurance to Minnesota employers and the Workers' Compensation Insurers' Rating Association of Minnesota (WCIRAM). WCIRAM was organized, pursuant to Minnesota Statutes, §79.01, *et seq.* to regulate workers' compensation insurance in Minnesota. *See* Minnesota Statutes, §79.11. Every insurer transacting the business of workers' compensation insurance in Minnesota was required to be a member of WCIRAM. *Id.* Effective January 1, 1984, the legislation providing for WCIRAM's existence was repealed, such that currently WCIRAM has no independent existence.

Plaintiffs complain that defendants violated the Sherman Antitrust Act, 15 U.S.C. §1, *et seq.* and the Minnesota Antitrust Law of 1971, Minnesota Statutes, §§ 325D.49-

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2. Specifically, the named plaintiffs are Austin Products Company, A&M Moving and Storage Company, Tony Downs Foods Company, Butterfield Foods Company, The Diocese of Winona, and Briggs Transportation Company.

3. Minnesota Statutes, §176.011, subdivision 10, defines employer as "any person who employs another to perform a service for hire; and includes [a] corporation, partnership, association, group of persons, state, county, town, city, school district, or governmental subdivision."

4. Specifically, the defendants in this case are The Workers' Compensation Insurers' Rating Association of Minnesota; The Travelers Insurance Company; Aetna Casualty and Surety Company; The Home Insurance Company; Fireman's Fund Insurance Company; St. Paul Fire and Marine Insurance Company; Employers Insurance of Wausau, a Mutual Company; Federated Mutual Insurance Company; Liberty Mutual Insurance Company; Sentry Insurance, a Mutual Company; Michigan Mutual Insurance Company; Twin City Fire Insurance Company; Excalibur Insurance Company; Continental Insurance Company; and Transport Insurance Company.

325D.66. Specifically, plaintiffs allege that between June, 1979, and April, 1983, defendants agreed to fix the price of workers' compensation insurance in Minnesota and enforced this agreement by boycotting, coercing, and intimidating, and by agreeing to boycott, coerce, and intimidate, plaintiffs and other insurers. Prior to June, 1979, all insurers were required to write workers' compensation insurance at rates approved by the Commissioner, Minnesota Statutes, §79.21. Effective June, 1979, Minnesota Statutes, §79.21, was amended to read that "[a]n insurer may write insurance at rates that are lower than the rates approved by the commissioner provided the rates are not unfairly discriminatory." Plaintiffs contend that from June, 1979, when the amendment to Minnesota Statutes, §79.21, was effective, until April, 1983, when the initial complaint in this consolidated action was filed, defendants agreed to fix the rates for workers' compensation insurance at the rates approved by the Commissioner, although Minnesota Statutes, §79.21, as amended, authorized lower rates.

In June, 1983, defendants first moved to dismiss this action. They claimed that the McCarran-Ferguson Act (the McCarran Act), 15 U.S.C. §1011, *et seq.*, precluded plaintiffs' federal antitrust claims. Specifically, they claimed that plaintiffs' federal antitrust claims were precluded by Sections 2(b) and 3(b) of the Act. 15 U.S.C. §1012(b) and 1013(b). The McCarran Act's Section 2(b) makes the Sherman Act inapplicable to "the business of insurance" to the extent it is regulated by state law.[5] At the same time, Section 3(b) of the

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5. The complete text of §2(b) reads as follows:

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided,

That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [15 USCS §§1 *et seq.*], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act

McCarran Act provides that, notwithstanding Section 2(b), the Sherman Act is applicable to agreements to boycott, coerce, or intimidate or acts of boycott, coercion, or intimidation.[6]

Defendants claimed that the alleged price fixing at issue in this case is the business of insurance and is regulated by state law. In addition, they asserted they had not agreed to boycott, coerce, or intimidate, nor engaged in acts of boycott, coercion, or intimidation, to enforce their alleged price fixing agreement. As such, they claimed plaintiffs could not prevail on their federal antitrust claims.

The Honorable Paul A. Magnuson, in *In Re Workers' Comp. Ins. Antitrust Litigation,* 574 F.Supp. 525 (D.Minn. 1983), denied defendants' motion to dismiss. *Id.* at 535. He found that rate-making constitutes the business of insurance even though it may be the result of an allegedly illegal price fixing agreement. *Id.* at 531. He also found that rate-making is regulated by the State of Minnesota. *Id.* at 533. Despite these findings, Judge Magnuson was unable to conclude that the Sherman Act is inapplicable to this case. He noted that because of the incomplete factual record, he was unable to determine whether defendants had agreed to boycott, coerce, or intimidate or engaged in acts of boycott, coercion, or intimidation in furtherance of their alleged price fixing agree-

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> of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 USCS §§41 *et seq.*], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. §1012(b).

6. The complete text of §3(b) reads as follows:

> (b) Nothing contained in this Act [15 USCS §§1011 *et seq.*] shall render the said Sherman Act [15 USCS §§1 *et seq.*] inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

15 U.S.C. §1013(b).

ment. *Id.* at 535. He invited a later summary judgment motion on the boycott issue after discovery was completed. *Id.*

Discovery has been completed regarding the boycott issue. This case has been transferred to the undersigned and the response to Judge Magnuson's invitation is now before this Court. Defendants seek summary judgment, claiming that discovery has failed to reveal any agreement to boycott, coerce, or intimidate plaintiffs or other insurers in furtherance of an alleged price fixing conspiracy. Defendants also claim discovery has not shown their engagement in acts of boycott, coercion, or intimidation. Absent such evidence, defendants contend they cannot be liable under the Sherman Act. *See* 15 U.S.C. §§1012(b) and 1013(b).

II. Discussion

In considering a motion for summary judgment, the Court has in mind the directive that defendants are entitled to summary judgment only if no genuine issue exists as to any material fact. Rule 56(c) of the Federal Rules of Civil Procedure. If the evidence is such that a reasonable jury could not return a verdict for the nonmoving parties, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510, 2511 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio,* 106 S.Ct. 1348, 1356 (1986). Although the movants have the burden of showing there is no genuine issue of fact, the nonmovants must set forth specific facts showing there is a genuine issue for trial; they may not rest upon mere allegation or denials of their pleading. *Anderson,* 106 S.Ct. at 2514; *Matsushita,* 106 S.Ct. at 1356; *Celotex Corporation v. Catrett,* 106 S.Ct. 2548, 2553 (1986). In considering a summary judgment motion, the evidence of the nonmovants is to be believed, and all justifiable inferences are to be drawn in their favor. *Anderson,* 106 S.Ct. at 2513.

A. Defendants' Motion for Summary Judgment

1. Plaintiffs' Federal Antitrust Claims

This Court must now engage in the difficult task of determining (a) what constitutes boycott, coercion, and intimidation for McCarran Act purposes; and (b) whether defendants have agreed to engage in or in fact have engaged in such acts of boycott, coercion, and intimidation. To put this task in its proper perspective, the Court will briefly outline the history of the McCarran Act and its purposes.

In *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 183 (1868), the United States Supreme Court held that the issuance of an insurance policy was not a transaction in interstate commerce. *See also St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 538-39 (1978); *In Re Workers' Comp.,* 574 F.Supp. at 527. As a result, regulation of the insurance industry was left virtually to the states. *Barry*, 438 U.S. at 539; *In Re Workers' Comp.,* 574 F.Supp. at 527. This state dominion over the insurance industry was threatened, however, by the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). In that case, the Court held that insurance was part of interstate commerce. *Id.* at 553; *see also Barry*, 438 U.S. at 539; *In Re Workers' Comp.,* 574 F.Supp. at 527. As a result of the *South-Eastern* decision, it is fair to say insurance-industry panic ensued. "The decision provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. It also left the insurance industry open to widespread antitrust liability. *In Re Workers' Comp.,* 574 F.Supp. at 527.

As a direct result of the *South-Eastern* decision, the McCarran Act was passed by Congress. *Group Life & Health Ins. v. Royal Drug Co.,* 440 U.S. 205, 217 (1979). It was enacted primarily to insure that the states could continue to

tax and regulate the business of insurance. *Id.* at 217-18, 218 n.18; *see also* 15 U.S.C. §1011 and 1012(a).[7] It was enacted secondarily in response to the insurance industry's perceived threat of federal antitrust liability. *Royal Drug*, 440 U.S. at 218-20.

From the language of the McCarran Act, it is clear that it was not intended to give the insurance industry a blanket exemption from federal antitrust laws. *Id.* at 220. Instead, pursuant to Section 2(b), the insurance industry is exempt from federal antitrust laws only to the extent that it is engaged in the business of insurance which is regulated by state law. Section 3(b) provides an exception to the exemption found in Section 2(b), however; even if the insurance industry is engaged in the business of insurance which is regulated by state law, it will still be subject to the federal antitrust laws if it agrees to engage in or does engage in acts of boycott, coercion, and intimidation.

In giving meaning to the terms boycott, coercion, and intimidation, this Court must walk that fine line between Section 2(b) and Section 3(b) of the McCarran Act. If the Court takes a restrictive view of those terms, Congress' purpose in enacting Section 3(b) will be thwarted; no agreements or actions of the insurance industry will constitute agreements to boycott, coerce and intimidate or acts of boycott, coercion, and intimidation. As such, the insurance industry will have a blanket exemption from the federal antitrust laws

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7. 15 U.S.C. §1011 provides that:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. §1012(a) provides that:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

which Congress did not intend. On the other hand, if the Court takes an expansive view of those terms, the Court will thwart Congress' clear intent to exempt the insurance industry from the federal antitrust laws as provided in Section 2(b); all agreements or actions of the insurance industry could be construed as agreements to boycott, coerce and intimidate or acts of boycott, coercion, and intimidation. As such, the insurance industry will be totally subject to the federal antitrust laws which Congress definitely did not intend.

In interpreting the terms boycott, coercion, and intimidation then, the Court traverses the distance between Scylla and Charybdis. The Court is not without guideposts in its travels, however. In *St. Paul Fire & Marine Ins. Co. v Barry*, 438 U.S. 531 (1978), the Supreme Court outlined some of the parameters of the terms boycott, coercion, and intimidation.[8]

The *Barry* Court concluded that the terms boycott, coercion, and intimidation should be given, for McCarran Act purposes, a meaning consistent with traditional Sherman Act usage. *Id.* at 541; *see also Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1287 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983). At the same time, however, the Court concluded that the precise reach of those terms is not coextensive with the prohibitions of the Sherman Act. *Barry*, 438 U.S. at 545 n.18; *see also Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 933-34 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346 (1984). To be sure, the Court has formulated something less than a "bright-line" test.

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8. Although the Supreme Court's *Barry* decision did provide some guidance in determining the meaning of the terms boycott, coercion, and intimidation, it was by no means definitive. In fact, the *Barry* decision, as it relates to the boycott terms, has been characterized as "rais[ing] more questions than it answers." Coughlin, *Losing McCarran Act Protection Through "Boycott, Coercion, or Intimidation"*, 54 Antitrust Law Journal 1281, 1286 (1985).

The Court generically defined a boycott as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *Barry*, 438 U.S. at 541; *see also Hoffman v. Delta Dental Plan of Minnesota*, 517 F.Supp. 564, 571 (D.Minn. 1981); *Trident Neuro-Imaging Laboratory v. Blue Cross*, 568 F.Supp. 1474, 1479 (D.S.C. 1983); *Nurse Midwifery Associates v. Hibbett*, 549 F.Supp. 1185, 1190 (M.D.Tenn. 1982). The Court noted that price fixing alone did not constitute a boycott or coercion. *Barry*, 438 U.S. at 545 n.18. However, price fixing plus some additional enforcement activity may constitute a boycott or coercion. *Id.*; *see also Proctor v. State Farm Mut. Auto Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), *vacated on other grounds*, 440 U.S. 942 (1979).

Plaintiffs have urged the Court to define boycott, coercion, and intimidation as a refusal to deal except upon specified terms. *In Re Workers' Comp.*, 574 F.Supp. at 534. For purposes of this case, however, the court declines the offered definition; it is inappropriate. Using plaintiffs' definition, a simple agreement among defendant insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with insurance companies who failed to adhere to the specified price. *See Proctor*, 561 F.2d at 274; *see also In Re Workers' Comp.*, 574 F.Supp. at 534. In other words, ordinary price fixing would constitute a boycott. As outlined above, however, the Supreme Court in *Barry* has made clear that price fixing alone does not constitute a boycott. *Barry*, 438 U.S. at 545 n.18. Therefore, plaintiffs' argument must fail.

Defendants, on the other hand, maintain that only an absolute refusal to deal can constitute a boycott, coercion, or intimidation for McCarran Act purposes. *In Re Workers' Comp.*, 574 F.Supp. at 534. The Court similarly rejects this formulation. Numerous cases have held that something less than an absolute refusal to deal can constitute a boycott. *See*

Va. Academy of Clinical Psy. v. Blue Shield of Va., 624 F.2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (comparison does not necessarily fail because the concerted refusal to deal is conditional, rather than absolute); *Hoffman v. Delta Dental Plan of Minnesota*, 517 F.Supp. 564, 572 (D.Minn. 1981) (those cases requiring a total refusal to deal read the Supreme Court's decision in the *Barry* case too narrowly), *Trident Neuro-Imaging Laboratory v. Blue Cross*, 568 F.Supp. 1474, 1479 (D.S.C. 1983) (partial refusal to deal accords with the common understanding of boycott) *Nurse Midwifery Associates v. Hibbett*, 549 F.Supp. 1185, 1191 (M.D. Tenn. 1982) (total exclusion from the open market is not necessarily essential to the Sherman Act concept of boycott); *Workman v. State Farm Mut. Auto. Ins. Co.*, 520 F.Supp. 610, 623 (N.D. Cal. 1981) (fact that a boycott is not absolute would not be dispositive). The Court recognizes that something less than an absolute refusal to deal can constitute an unreasonable restraint on the freedom to buy and sell in the open market, which is essential to the concept of boycott. *Trident*, 568 F.Supp. at 1479; *Hibbett*, 549 F.Supp. at 1191. Therefore, defendants' argument must also fail.

Rather, the Court believes, and maintains as the law of this case, that there is "an undesignated point, on the line between 'mere price fixing' and an absolute refusal to deal, where enforcement activity in support of a conspiracy to fix prices gives rise to a 'boycott' for purposes of the McCarran Act." *In Re Workers Comp.*, 574 F.Supp. at 535. With that formulation in mind, plaintiffs contend that defendants have engaged in sufficient enforcement activity in support of their alleged price fixing agreement to have reached and crossed that undesignated point.[9] As evidence of enforcement activity, plaintiffs contend that defendants, through WCIRAM a) required insurers to subscribe to WCIRAM's articles of association, b) required insurers to execute subscription

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9. Although plaintiffs, in their complaint, allege that defendants boycotted both plaintiffs and other insurers, their evidence of enforcement activity focuses on other insurers.

forms, c) sent out circular letters, d) reviewed policies of insurance, and e) prohibited division-of-payroll. Each of these will be examined in detail below.

a. Articles of Association

As outlined above, WCIRAM was organized pursuant to Minnesota law to regulate the workers' compensation insurance industry in Minnesota. Minnesota Statutes, §79.11. Every insurer transacting the business of workers' compensation insurance in Minnesota was required to be a member of WCIRAM and WCIRAM was required to admit any such insurer to membership. Minnesota Statutes, §79.11 and 79.12.

Minnesota Statutes, §79.12, required WCIRAM to adopt articles of association and bylaws for its governance and the governance of its members. WCIRAM adopted its first articles and bylaws in 1921. These were routinely revised over the ensuing years with one revision occurring in April, 1979. This revision remained in force after June, 1979, when the amendment to Minnesota Statutes, §79.21, went into effect, allowing for insurance rates lower than those approved by the Commissioner. The articles and bylaws were again revised in January, 1981, and January, 1982. Members of WCIRAM were required to subscribe to its articles and bylaws.

The April, 1979, and January, 1981, articles and bylaws provided 1) that WCIRAM, through its Rates and Classification Committee and its President, was to classify all workers' compensation risks and determine their rates and 2) that WCIRAM's classifications and rates were binding on all insurers. The 1982 articles and bylaws stated that WCIRAM's purpose, among other things, was to classify and rate workers' compensation insurance. Further, they indicated that each member of WCIRAM must comply with its articles and bylaws and adhere to all filings made by WCIRAM on its behalf. Those same articles and bylaws, however, provided that each member had the "right to use departures from such filings in

accordance with the requirements of law specifically applicable thereto." Article III,2., (c), Articles of Association and Bylaws, Workers' Compensation Insurers' Rating Association of Minnesota, Revised January 26, 1982. There is nothing in the 1982 articles and bylaws which explicitly indicated that WCIRAM's classifications and rates were binding on all insurers. All of the revisions outlined above had provisions indicating that members could be expelled from WCIRAM.

In light of Minnesota Statutes §79.12, which mandated the existence of WCIRAM's articles and bylaws, the Court finds that they were not passed to enforce an alleged price fixing agreement among workers' compensation insurers nor are they evidence of any enforcement activity to promote such an alleged agreement. It is clear to the Court that the articles and bylaws were passed to govern the complex workings of the workers' compensation insurance industry, not to promote some alleged price fixing conspiracy.

It is true that the 1979 and 1981 articles and bylaws made provision for rates, requiring members to adhere to those rates. Those revisions appear to be vestiges of the pre-1979 law which required all insurers to charge rates set by the Commissioner. It is clear the 1982 articles and bylaws did not compel such a rate adherence and, in fact, allowed members to depart from any of WCIRAM's mandates to accommodate the law.

Even if the Court were to construe the articles and bylaws as potential means to enforce an alleged price fixing agreement, there is nothing to suggest those means were successful. No evidence has been presented to the Court to show that any insurer was expelled from WCIRAM or prevented from selling workers' compensation insurance in Minnesota because of deviation or attempts at deviation from the rates set by the Commissioner. The existence of an alleged price fixing agreement, absent any act or indication of enforcement, is nothing more than a toothless tiger lacking the ability to create a legally defined boycott or agreement to

boycott. Defendants have made no use of any enforcement means purportedly at their disposal; without doing so, no restraint on trade can occur.

b. Subscription Forms

Members of WCIRAM were required to sign subscription forms. In March, 1982, after the January, 1982, revision of WCIRAM's articles and bylaws, a special effort was made to obtain signed subscription forms from every member of WCIRAM. Each member was sent two copies of the January, 1982, articles and bylaws with subscription forms attached and each was requested to sign one subscription form and return it. The subscription form provided, in pertinent part, that "the undersigned insurer signifies its acceptance of membership in . . . [WCIRAM] by subscribing to the Articles of Association and Bylaws and agrees to observe and to be bound by the rules, rates, and regulations of the Workers' Compensation Insurers' Rating Association of Minnesota." *See* Affidavit of K. Craig Wildfang, Exhibit A, Dep. Ex. 1 at A-95.

In April, 1983, WCIRAM sent a letter to those insurers who had not returned signed subscription forms. That letter provided, in pertinent part, that:

> We have been writing to you since March 8, *1982*, attempting to secure signed Articles of Association and Bylaws. It is important that we be furnished with the Articles in order to maintain your company's membership in our Association.
>
> As your company has not complied with our requests we assume that you no longer wish to continue your membership in our Association. This letter will serve as notice that your company's membership will be terminated as of May 15, 1983, in absence of the signed Articles. [emphasis in original]

See Affidavit of K. Craig Wildfang, Exhibit A, Dep. Ex. 16 at 108237.

Plaintiffs contend that because insurers were required to sign a subscription form stating they agreed to observe and be bound by WCIRAM's rates, that defendants were enforcing an alleged agreement to fix the price of workers' compensation insurance in Minnesota. That assertion is plainly without substance. First, the rate language of the subscription form could easily mean that insurers were prohibited from charging rates higher than those set by the Commissioner,[10] not that they could not charge lower rates. Further, the January, 1982, articles and bylaws attached to the subscription forms clearly indicated that insurers could deviate below the rates set by the Commissioner. *See* Section II.,A.,1.,a. above. By no means, then, could the subscription forms be construed as enforcing a price fixing agreement to charge rates for workers' compensation insurance at the maximum set by the Commissioner.

Plaintiffs contend, however, that WCIRAM threatened to expel those who did not submit signed subscription forms, and because those forms dealt with rates, the threatened expulsion constituted enforcement activity. There is no indication in the evidence presented, however, that those who failed to sign subscription forms did so because they wanted to charge rates lower than those set by the Commissioner nor is there evidence to indicate that WCIRAM desired to expel them because they wanted to or attempted to charge lower rates.

Even if the insurers who failed to sign subscription forms did so because they wanted to charge lower rates, it is clear that WCIRAM could not expel them from the Association. Pursuant to Minnesota Statutes, §79.12, WCIRAM was required to admit into the Association any insurer authorized to transact workers compensation insurance in Minnesota. The only way that an insurer could be expelled from

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10. The Court will not here consider the possibility that a proscription against higher rates could itself be an antitrust violation since the Court summarily rejects the possibility that these insurance-purchasing plaintiffs are seeking higher rates.

WCIRAM was if it was not authorized to transact workers' compensation insurance in Minnesota. But this power did not lie with WCIRAM, only the Commissioner had the power to revoke such authority. It cannot be claimed that the workers' compensation insurers who were threatened with expulsion by WCIRAM were unsophisticated business people unaware of the law. They are instead some of the major insurance companies in the United States. They knew WCIRAM could not expel them. Therefore, even if WCIRAM's threatened expulsion could be viewed as attempted enforcement activity, it was attempted activity that all realized had no teeth. Such activity cannot constitute a boycott.

c. Circular Letters

From time-to-time, WCIRAM would send its members circular letters with varied information concerning the workers' compensation insurance industry. Some of these letters would contain rate information and would have attached schedules of rates for workers' compensation insurance in Minnesota. *See* Affidavit of K. Craig Wildfang, Exhibit A, Dep. Ex. 21 and 22. These rate schedules listed the maximum prices for workers' compensation insurance as set by the Commissioner.

Plaintiffs contend these circular letters and their attached rate schedules were used to enforce the alleged price fixing agreement among the defendants. They claim the circular letters never informed insurers that the rates in the rate schedules were the maximum rates for insurance and that insurers could, in fact, deviate downward from those rates. On this soft foundation, they contend that the rate schedules were used as a means to induce insurers to believe that the rates on the schedules were the only rates they could charge.

A necessary premise in this argument is that workers' compensation insurers in Minnesota are unsophisticated in business and could not, on their own, discern the State of Minnesota's statutory enactments. Minnesota Statutes,

§79.21, as amended, clearly provided that insurers could deviate downward from the insurance rates set by the Commissioner. It cannot be said that Minnesota insurers were so unsophisticated as to be unaware of the law. The defendants do not appear to be lambs; rather they are the major insurance companies in the United States. There is no evidence that any insurer in Minnesota was misled by the rating schedules into believing that it could only charge the rates set forth in the schedule. The Court holds, based upon the developed factual and statutory record, that the circular letters and their rating schedules are insufficient as a matter of law to constitute a boycott, coercion, or intimidation for McCarran Act purposes.

d. Policy Review

WCIRAM required all of its members to file with WCIRAM each policy of workers' compensation insurance they issued in Minnesota. These polices were reviewed by employees of WCIRAM to determine if they were properly classified and priced. If a policy was not priced at the rate set by the Commissioner, WCIRAM would send to the insurer a "disapproval notice" instructing the insurer to modify the policy to use the correct rate.

Defendants contend that WCIRAM's policy review procedure was modified within months after the law on authorized rates changed in 1979. Under this modification, criticisms were no longer sent out when rates were less than the maximum. Plaintiffs agree that WCIRAM's policy review procedure was modified but contend such modification did not occur until the fall of 1980.

The exact date notwithstanding, the Court holds that WCIRAM's policy review procedure did not constitute enforcement activity sufficient to constitute a boycott, coercion, or intimidation. No evidence has been presented that even a single insurer changed its rates as a result of a disapproval notice. Further, no evidence has been presented that even a single insurer suffered any adverse consequences for failing

to change its rates in light of a disapproval notice. No insurer was expelled from WCIRAM, prevented from selling workers' compensation insurance in Minnesota, nor forced to change its rates. In short, no insurer was prevented from competing in the workers' compensation insurance business. Absent such evidence, the Court cannot conclude that WCIRAM's policy review procedure and disapproval notices were enforcement activity that constituted a boycott, coercion, or intimidation.

e. Division of Payroll

The 1979 amendments to Minnesota's workers' compensation insurance act, in addition to allowing insurers to charge rates less than those set by the Commissioner, *see* Minnesota Statutes, §79.21, allowed employers to divide their payroll among relevant rating classifications for purposes of premium classifications. *See* Minnesota Statutes, §79.211, subdivision 2.[11] By thus dividing their payroll, employers could reduce their premiums for workers' compensation insurance.

Plaintiffs contend that subsequent to the 1979 amendments, defendants, largely through WCIRAM, decided to deny any requests by employers to have their insurance premiums determined based on a division-of-payroll basis. Plaintiffs contend this is further evidence of enforcement activity in support of an alleged price fixing agreement. This Court disagrees.

First, absolutely no evidence has been presented indicating that an employer who requested premium calculations based on division-of-payroll was denied such

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11. Minnesota Statutes, 79.211, subdivision 2, as amended, provided that:

> Division of Payroll. The rating association or an insurer shall permit an employer to divide his payroll among relevant rating classifications for purposes of premium calculation when the employer's records provide adequate support for a division.

calculations. In fact, plaintiffs admit that division-of-payroll premium calculations were actually used on some policies between 1979 and 1982. *See* Plaintiffs' Memorandum In Opposition To Defendants' Renewed Motion For Summary Judgment at 18.

Further, nothing in the evidence suggests that defendants refused to sell workers' compensation insurance to any employers who attempted to reduce their workers' compensation insurance rates by dividing their payrolls. Evidence only perhaps may suggest that defendants would only sell insurance to employers if they agreed to buy it at a fixed price. But this does not constitute a boycott, coercion or intimidation for McCarran Act purposes. As was noted earlier: a refusal to deal except at a specified price, *i.e.*, mere price fixing, does not constitute a boycott, coercion, or intimidation. *Barry*, 438 U.S. at 545 n.18. There is no evidence that defendant's acts went beyond mere price fixing; there is no evidence of any enforcement acts beyond a reluctance to sell except at a specified price. Therefore, plaintiffs' division-of-payroll allegations do not suggest enforcement activity in support of an alleged price fixing agreement sufficient to constitute a boycott, coercion, or intimidation or an agreement to boycott, coerce, or intimidate.

In light of the above, defendants' motion for summary judgment must be granted.

2. Plaintiffs' Pendent State Law Claims

The Court has granted defendants' motions for summary judgment on plaintiffs' federal antitrust claims. Remaining before the Court are plaintiffs' pendent state antitrust claims. The general rule is that pendent claims should be dismissed without prejudice if federal claims are dismissed before trial. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Clayton v. Blachowske Truck Lines, Inc.*, 640 F.Supp. 172, 174 (D.Minn. 1986), *aff'd,* 815 F.2d 1203 (8th Cir. 1987). To proceed with state claims lacking an independent basis of federal jurisdiction after all federal claims have been dis-

missed is discretionary with the trial court, however. *Koke v. Stifel, Nicolaus & Co., Inc.*, 620 F.2d 1340, 1346 (8th Cir. 1980); *see also Less v. Lurie,* 789 F.2d 624, 626 (8th Cir. 1986).

Factors to consider in the exercise of the Court's discretion include the difficulty of the state claims, the amount of judicial time and energy already invested in them, the amount of additional time and energy necessary for their resolution, and the availability of a state forum. *Koke,* 620 F.2d at 1346; *Clayton,* 640 F.Supp. at 174. Having weighed these factors, the Court is convinced that plaintiffs' state claims could be better heard in the Minnesota forum and should be dismissed without prejudice.

B. The Joint Motion of Plaintiffs and Wausau for Preliminary Approval of Their Proposed Settlement Agreement.

In this case, plaintiffs and defendant Wausau have reached a proposed agreement. The proposed agreement provides, in substance, that Wausau will pay to plaintiffs $300,000, plus all interest accrued thereon. Plaintiffs and Wausau are jointly seeking preliminary approval of this agreement. The Court declines to preliminarily grant the requested approval.

Unlike the settlement of most private civil actions, class actions may only be settled with district court approval. *Officers for Justice v. Civil Service Com'n, Etc.*, 688 F.2d 615, 623 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983); *Parker v. Anderson,* 667 F.2d 1204, 1208 (5th Cir.); *cert. denied,* 459 U.S. 878 (1982). Rule 23(e) of the Federal Rules of Civil Procedure provides that "[a] class action shall not be dismissed or compromised without the approval of the court."

As was outlined in §II.A.1. above, the Court has granted summary judgment to the defendants. Therefore, plaintiffs cannot sustain their federal antitrust claims. This leaves plaintiffs' state antitrust claims as the only potential basis for defendants' liability and the only basis on which the proposed

settlement agreement at issue can be premised. The Court has determined, however, that those state claims should be dismissed without prejudice.

For reasons of jurisdiction and comity, then, the Court declines to grant preliminary approval to the proposed settlement agreement. Such a determination is more appropriately left to the Minnesota Courts.

For the reasons set forth above, IT IS ORDERED that:

1. Defendants' motion for summary judgment on plaintiffs' federal antitrust claims, set forth in Counts I, II, and III, of plaintiffs' consolidated amended complaint is granted.

2. Plaintiffs' pendent state law claims, set forth in Count IV of plaintiffs' consolidated amended complaint are dismissed without prejudice.

3. The joint motion of plaintiffs and defendant Wausau for preliminary approval of their proposed settlement agreement is denied.

4. Defendants' motion for an award of costs, disbursements, and attorneys' fees is denied.

RELEVANT STATUTES AND RULES

The Sherman Act of 1890, § 1, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Rule 56 of the Federal Rules of Civil Procedure provides as follows:

> **Summary Judgment**
>
> **(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day

of the hearing may serve opposing affidavits. The judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If upon motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary

judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall forthwith be rendered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As in effect from June 12, 1979 until December 31, 1983, Minnesota Statutes provided in pertinent part as follows:

79.01 DEFINITIONS.

Subd. 2. *Insurer.* The word "insurer" means any insurance carrier authorized by license issued by the

commissioner of insurance to transact the business of workers' compensation insurance in this state . . . .

79.071 RATES; HEARINGS.

Subdivision 1. The commissioner shall adopt a schedule of workers' compensation insurance rates for use in this state for each classification under which business is written until January 1, 1986. The schedule of rates shall not be excessive, inadequate, or unfairly discriminatory. In adopting a schedule of rates, the commissioner may act on the written petition of the association or any other interested party requesting that a hearing be held for modification of the schedule of rates.

79.11 INSURERS SHALL BE MEMBERS OF ASSOCIATION.

Every insurer transacting the business of workers' compensation insurance in this state shall be a member of the association organized under sections 79.01 to 79.23, to be maintained in this state for the following purposes:

(1) To separate the industries of this state that are subject to workers' compensation insurance into proper classes for compensation insurance purposes; to make inspections of compensation risks and to apply thereto the merit and experience rating system approved for use in this state; to establish charges and credits under the system and make reports showing all facts affecting these risks as the subject of compensation insurance and for approving policies of compensation insurance as being written in conformity with classifications and rates previously promulgated by the association and approved by the commissioner; and

(2) To assist the commissioner and insurers in approving rates, determining hazards and other

material facts in connection with compensation risks, and to assist in promoting safety in the industries.

79.12 ORGANIZATION OF ASSOCIATION.

The association shall adopt articles of association and bylaws for its government and the government of its members. These articles and bylaws and all amendments thereto shall be filed with and approved by the commissioner and shall not be effective until so filed and approved. The association shall admit to membership any insurer authorized to transact workers' compensation insurance in this state. . . .

79.17 ASSOCIATION SHALL MAKE CLASSIFICATION.

The association shall, on behalf of its members, assign each compensation risk and subdivision thereof in this state to its proper classification. The determination as to the proper classification by the association shall be subject to the approval of the commissioner as herein provided. The association shall, on behalf of all members thereof, inspect and make a written survey of each risk to which the system of merit rating approved for use in this state is applicable. . . . The association classification shall be binding on all insurers. . . . Every insurer shall promptly file with the association a copy of each payroll audit, which shall be checked by the association for correctness of classification and rate. . . .

79.21 RATES TO BE UNIFORM; EXCEPTIONS.

No insurer shall write insurance at a rate that exceeds that made and put into force by the bureau and approved as reasonable by the commissioner. The bureau may reduce or increase a rate by the application to individual risks of the system of merit or experience rating which has been approved by the commissioner. This reduction or increase shall be set forth in the policy or by endorsement thereon. Upon written request an

insurer shall furnish a written explanation to the insured of how and why the individual rate was adjusted by application of a system of merit or experience rating. This explanation shall be mailed to the insured within 30 days of the request. An insurer may write insurance at rates that are lower than the rates approved by the commissioner provided the rates are not unfairly discriminatory.

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

Petitioner Workers' Compensation Insurers' Rating Association has no parents, affiliates or subsidiaries.

Petitioner Aetna Casualty & Surety Co. is wholly owned by Aetna Life And Casualty Co. The subsidiaries (except for wholly owned subsidiaries) and affiliates of petitioner Aetna Casualty & Surety Co. are as follows: South Bend Joint Venture, Aegen International, Inc., Mariner Brookhollow Joint Venture, ADB1, Ponderosa Homes, ABP Associates Ltd., Church Insurance Partnership Agency, Hyatt Plaza, Park Lake Associates, North Lake Center Associates, Central Trust Center Associates, Aetna Peterson Jacobs and Rand Technology Ventures, TAAS Associates, Portside Properties Ltd., 211 East Ontario Associates, Executive Re. Inc. and Executive Risk Management Associates.

Petitioner Continental Insurance Co. is wholly owned by The Continental Corporation. The subsidiaries and affiliates (except for wholly owned subsidiaries) of petitioner Continental Insurance Co. are as follows: Marine Office of America Corp., Underwriters Re Acquisition Corp., Insurnert, Inc., Continental Center Associates, Marine Office of American Corp., The Maiden Lane Syndicate, Inc., Associated Aviation Underwriters, The South Place Syndicate, Inc., Commercial Aseguradora Suizo Americana, S.A., First Fire & Marine Insurance Co., Ltd., Promotora Continental, S.A., Comercial Afianzadora, S.A., Inter-Continental Seguradora, S.A., Servicios Continental, S.A., Malayan Overseas Insurance Corp., United Continental Insurance Sdn. Bhd., Deutsche Continental Reinsurance Co. AG, Lombard General Insurance Co., Ltd., Asia Insurance Co., Ltd., Connaught Insurance Co., Ltd., The Aljazirah Insurance Co. Ltd., Saudi Continental Insurance Co., E.C., Puerto Rican-American Insurance Co., Security National Life Insurance Co., Inter-Continental Seguradora, Groupe Barthelemy Agency, Jardine Insurance Underwriting Management Ltd., Deutsche Continental Reinsurance, A.G.,

La Venezolana De Seguros CA, Alte Leipziger Versicherung AG, and Bishophouse Ltd.

The affiliates and subsidiaries (other than wholly owned subsidiaries) of petitioner Federated Mutual Insurance Co. are as follows: Federated Life Insurance Co., Federated Service Insurance Co., and Federated Lloyds of Texas Co.

Petitioner Fireman's Fund Insurance Co. is a wholly owned subsidiary of Fireman's Fund Corp. All of the subsidiaries of Fireman's Fund Insurance Co. and Fireman's Fund Corp. are wholly owned subsidiaries.

Petitioner The Home Insurance Co. is wholly owned by The Home Group, Inc. The subsidiaries (except for wholly owned subsidiaries) and affiliates of petitioner The Home Insurance Company are as follows: Robinson-Conner, Inc., Home Transportation Agency, Boston Venture Partnership Limited I, Boston Venture Partnership Limited II, Fifth Generation Computer Corp., Hoover Group, Inc., American Technology, Inc., CX Partners, L.P., Tuxedo Park Associates, and City/Ormong Management Co.

Petitioner Liberty Mutual Insurance Co. is affiliated with Liberty Mutual Fire Insurance Co. , Liberty Financial Services, Inc., Liberty Mutual U.S. Government Guaranteed Securities Income Trust, Liberty Mutual Tax-Exempt Income Trust, Touche Remnant Buildings Ltd., Steinroe International Growth Fund, Liberty All-Star Equity Fund, Liberty Northwest Insurance Corp., Liberty Mutual Property-Casualty Building Corp., Liberty Life Assurance Co. of Boston, Helmsman Management Services, Inc., Liberty International Insurance Agency, Inc., and Liberty Mutual Insurance Co. Ltd.

Petitioner Michigan Mutual Insurance Co.'s affiliates are as follows: Amerisure Lloyds, Amerisure Re (Bermuda), Ltd., and Amerisure Intermediaries, Inc.

Petitioner Sentry Insurance, a Mutual Company, is affiliated with Sentry Indemnity Co.

Petitioner St. Paul Fire & Marine Insurance Co. is wholly owned by The St. Paul Companies, Inc. Neither St. Paul Fire & Marine Insurance Co. nor The St. Paul Companies, Inc., has any subsidiaries or affiliates other than wholly owned subsidiaries.

Petitioner Transport Insurance Co. is wholly owned by Great American Insurance Co., which in turn is wholly owned by Great American Holding Corp., which in turn is wholly owned by American Financial Corp. The subsidiaries (except for wholly owned subsidiaries) and affiliates of petitioner Transport Insurance Co. are as follows: The Penn Central Corporation, Republic American Corporation, and Sprague Technologies, Inc.

Petitioner The Travelers Insurance Co. is wholly owned by The Travelers Corporation. The subsidiaries (except for wholly owned subsidiaries) and affiliates of petitioner The Travelers Insurance Co. are as follows: Travelers Indemnity Co., Phoenix Insurance Co., Charter Oak Fire Insurance Co., Travelers Indemnity Co. of Rhode Island, Travelers Indemnity Co. of Illinois, Travelers Indemnity Co. of America, Travelers Insurance Co. of Illinois, Constitution State Insurance Co., Travelers of Ireland Ltd., Travelers Corp. of Bermuda Ltd., Terra Nova Insurance Co., Ltd., ATALFA (UK), Travelers Reinsurance Co. of Bermuda Ltd., Travelers Lloyds Insurance Co., Travelers Corp. (U.K.) Ltd., La Metropole S.A., Bankers and Shippers Insurance Co., Travelers Investment Management Co., Travelers Equities Sales, Inc., The Massachusetts Co., Inc., Keystone Investment Management Corp., Fiduciary Investment Co., Keystone Custodian Funds, Inc., Keystone Distributors Inc., H.C. Copeland Financial Services, Inc., H.C. Copeland and Associates, Inc., H.C. Copeland and Associates Equities, Inc., University Research Associates, Inc., Intangible Marketing, Inc., H.C. Copeland Associates, Inc. of Massachusetts, Keystone Group, Inc., Travelers Mortgage Securities Corp., Harbor Keystone Advisers, Inc., Travelers Keystone Fixed Income Advisers, Inc., Dillon, Read Inc.,

Dillon, Read & Co. Inc., Dillon, Read Real Estate Inc., Dillon, Read Ltd., Dillon, Read Securities Inc., Dillon, Read Capital Inc., Dillon, Read Services Inc., N.S.P.D.R. Inc., Dillon, Read Enskilda Partners, Dillon, Read Mortgage Capital Inc., Dillon, Read Interfunding Inc., Dillon, Read Development Inc., Dillon, Read International Securities Inc., Dillon, Read (France) S.A., Dillon, Read International Marketing Services Inc., Wine Fund Managers (Guernsey) Ltd., ABC Management Inc., Dillon, Read International Asset Management, Dillon, Read (UK) Ltd., The Prospect Co., Prospect Management Services Co., The Plaza Corp., Consolidated Agencies Northwest, Inc., Travelers Realty Investment Co., Travelers General Agency of Hawaii, Inc., Joseph A. Wynne Agency, Syd Tozier & Associates, Insurance Brokers, Inc., Constitution State Management Co., Constitution State Service Co., Travelers Syndicate #1, Inc., Derby Advertising, Inc., Travtech, Inc., Constitution Plaza, Inc., The Travelers Marine Corp., KPI 85, Inc., Travelers/EBS, Inc., Conservco, Keystone Financial Corp., Center for Corporate Health Promotion, Inc., Travelers Diebold Technology Co., Inc., Travelers Mortgage Service, Inc., Managed Health Care Services, Inc., Travelers Mortgage Capital Corp., TDR Mortgage Securities I, Inc., Travelers Mortgage Insurance Agency, Inc. (Delaware), Travelers Mortgage Insurance Agency, Inc. (New Jersey), ERMC, Inc., Travelers Realty Network, Inc., Travelers Asset Funding Corp., Travelers Home Equity Centers, Inc., Travelers Home Insurance Center, Inc., Panther Valley, Inc., Panther Valley Service, Inc., Pequest Sewer Co., Pequest Water Co., Panther Valley Country Club, Inc., Prospect Nebraska Land Holding Co., Meadow Lane, Inc., 89th & York Avenue Corp., Keystone Properties, Inc., Travelers Income Properties I, Travelers Income Properties II, Keystone Realty Advisers, Inc., Keystone Realty Partners, Inc., Travelers Real Estate Investment Trust, Park Place West Limited Partnership, Travelers Real Estate Investment Trust 2, Blue Ash Associates Limited Partnership, Keystone Blue Ash Limited Partnership, Dublin Regional Plaza Joint

Partnership, KBA 3 Limited Partnership, Travelers Realty Income Investors, Travelers Realty/100 L.P., Keystone Tax Free Fund, Keystone Tax Exempt Trust, Travelers Growth Stock Account for Variable Annuities, Travelers Quality Bond Account for Variable Annuities, Travelers Fund B for Variable Contracts, Travelers Fund B-1 for Variable Contracts, Travelers Timed Money Market Account for Variable Annuities, Travelers Timed Growth Stock Account for Variable Annuities, Travelers Timed Bond Account for Variable Annuities, Travelers Timed Aggressive Stock Account for Variable Annuities, Master Reserves Trust, Keystone International Fund, Inc., Keystone Liquid Trust, Keystone Custodian Fund—Series B-1, Keystone Custodian Fund—Series B-2, Keystone Custodian Fund—Series B-4, Keystone Custodian Fund—Series K-1, Keystone Custodian Fund—Series K-2, Keystone Custodian Fund—Series S-1, Keystone Custodian Fund—Series S-3, Keystone Custodian Fund—Series S-4, Cash Income Trust, Travelers Money Market Account for Variable Annuities, Aggressive Stock Trust, Money Market/Options Investments, Inc., Master Reserves Tax-Free Trust, Managed Assets Trust, High Yield Bond Trust, Keystone Precious Metals Holdings, Inc., The Salem Funds, Adria-TIC International Holdings, S.A., Travelers Asset Management International Corp., Travelers International Finance Corp., London & Hartford Corp., Connecticut Fire Insurance Co., C.S.I., Inc., Travelers Insurance Corp. Proprietary Ltd., Fund Administrators, Inc., Travelers Plan Administrators, Inc., Travelers Plan Administrators of California, Travelers Plan Administrators of Michigan, Travelers Plan Administrators of Minnesota, Travelers Plan Administrators of Colorado, Travelers Plan Administrators of Pennsylvania, Travelers Plan Administrators of Arizona, Travelers Plan Administrators of Ohio, Travelers Plan Administrators of Tennessee, Travelers Plan Administrators of Texas, Travelers Plan Administrators of Florida, Travelers Plan Administrators of Illinois, Travelers Plan Administrators of Washington, Travelers Health Network, Inc., Travelers Health Network of

California, Inc., Travelers Health Network of Connecticut, Inc., Travelers Health Network of Florida, Inc., Travelers Health Network of Illinois, Inc., Travelers Health Network of Louisiana, Inc., Travelers Health Network of New Jersey, Inc., Travelers Health Network of New York, Inc., Travelers Health Network of Pennsylvania, Inc., Travelers Health Network of South Carolina, Inc., Travelers Health Network CMP of South Carolina, Inc., Travelers Health Network of Tennessee, Inc., Travelers Health Network of Virginia, Inc., Travelers Health Network of Austin, Inc., and Travelers Health Network of Texas, Inc.

Petitioner Twin City Fire Insurance Co. is a 99.9% subsidiary of Hartford Fire Insurance Co., which is a wholly owned subsidiary of ITT Hartford Group, which is a wholly owned subsidiary of ITT Corp. The subsidiaries (except for wholly owned subsidiaries) and affiliates of petitioner Twin City Fire Insurance Co. are as follows: Hartford Insurance Co. of Connecticut, Hartford Accident & Indemnity Co., Hartford Casualty Insurance Co., Hartford Underwriters Insurance Co., Great Eastern Insurance Co., Hartford Insurance Co. Canada, Hartford Insurance Co. of Illinois, Hartford Insurance Co. of the Southeast, Hartford Insurance Co. of the Midwest, and 1810 General Agency Inc. of Texas.